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Report of the Special Rapporteur on the rights of indigenous peoples on her mission to the United States of America

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the rights of indigenous peoples on her visit to the United States of America from 22 February to 3 March 2017. In the report, the Special Rapporteur examines the human rights situation of indigenous peoples in the United States, with a particular focus on extractive industries.

The issues surrounding energy development underscore the need for reconciliation and improvement of the government-to-government relationship moving forward. Significant work remains to be done to implement policies and initiatives to further the rights of indigenous peoples to self-determination and consultation. In the current political context, with increased incentives for fossil fuel energy development and decreased budgets for environmental and indigenous peoples' protection agencies, the threats facing indigenous peoples may be further exacerbated.

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Report of the Special Rapporteur on the rights of indigenous peoples on her mission to the United States of America*

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* Circulated in the language of submission only.

I. Introduction

1. Pursuant to Human Rights Council resolution 33/12, the Special Rapporteur on the rights of indigenous peoples visited the United States of America from 22 February to 3 March 2017. The Special Rapporteur expresses her gratitude to the Government of the United States for its invitation and full cooperation.

2. The purpose of the visit was to assess the impacts of energy development projects — including resource development through extractive industries, hydroelectric power, geothermal exploration — and wind and solar projects on Indian tribes living both within and outside of reservations. Special attention was paid to the Dakota Access Pipeline and its impact on indigenous peoples, including the Standing Rock Sioux tribe and other tribes indirectly affected by the pipeline.

3. During her 10-day visit, the Special Rapporteur visited Fort Yates, Fort Berthold and Bismarck in North Dakota; Washington, D.C.; Albuquerque in New Mexico; Window Rock in Arizona and Boulder in Colorado. She met with federal and regional representatives of the federal Government in Washington, D.C., and representatives of North Dakota, the Senate Committee on Indian Affairs and the House Subcommittee on Indian, Insular and Alaska Native Affairs.

4. The Special Rapporteur visited several tribal communities, met with leaders from across the Great Plains and held the first-ever virtual consultation. She also met with a wide range of civil society and human rights organizations working on indigenous peoples' rights.

5. Energy development is of critical concern for many reasons. First, when tribes are able to leverage the resources on their land, they can enact economic development in a self-determined manner, which would enable them to exercise their sovereignty. Second, the impacts and effects of energy development occur on a much larger scale than other types of economic development as it directly affects the lands and territories where indigenous peoples live and which are vital to their society, spirituality and culture. Currently, nearly 20 per cent of the untapped energy resources in the United States are located on or near Indian lands,[1] which means an even greater potential for renewable energy. Thus, a comprehensive view of all forms and phases of energy development — including exploration, implementation and reclamation — is necessary to understand the benefits and risks of development for indigenous peoples in the short and long term.

II. Legal, institutional and policy framework

6. The United States has ratified international treaties relevant to the rights of indigenous peoples, including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and has made reservations with respect to those treaties.

7. In 2014, the Committee on the Elimination of Racial Discrimination[2] noted that indigenous peoples continued to be disproportionately affected by negative health impacts from extractive and manufacturing industries and recommended the clean-up of any remaining radioactive and toxic waste with particular attention to neglected indigenous peoples. It urged the intensification of efforts to prevent and combat violence against American Indian and Alaska Native women in particular and to ensure that all cases of violence against women were effectively investigated, perpetrators prosecuted and sanctioned and victims provided with appropriate remedies. It also urged that measures be

[1] See Indian Energy Development hearing before the Committee on Indian Affairs, United States Senate, 110th Congress, 1 May 2008.

[2] CERD/C/USA/CO/7-9.

taken to guarantee the right of access to justice and effective remedies for all indigenous women victims of violence.

8. The Human Rights Committee [3] recommended that measures be adopted to effectively protect indigenous sacred areas against desecration, contamination and destruction and that consultations be held with a view to obtaining the free, prior and informed consent of indigenous peoples for proposed project activities.

9. During the universal periodic review [4] in 2015, the United States accepted the recommendations regarding the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples, continued attention to violence against indigenous women, respect and consultation with indigenous peoples to support their rights to traditionally owned lands and resources, adoption of measures to effectively protect sacred areas against environmental exploitation and degradation, corrective action and compensation relating to historical injustice and continued efforts in the education of American Indian students.

10. The United States has recognized the sovereignty of Indian tribes under its protection [5] and 567 Indian entities with acknowledged "immunities and privileges available to federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States" [6] which are eligible to receive services from the Bureau of Indian Affairs. The Constitution of the United States states that Congress shall have the power to regulate commerce with the Indian tribes [7] and, with respect to the apportionment of taxes [8] and representatives [9] among States, excludes Indians who are not taxed. The United States has a trust responsibility vis-à-vis Indians based on commitments made in treaties and agreements that have established enduring and enforceable federal obligations, under which Indian tribes surrendered claims to vast amounts of land to the benefit of the people of the United States.

11. The Department of the Interior Bureau of Indian Affairs provides services directly or through contracts, grants or compacts to approximately 1.9 million Indians and Alaska Natives in the 567 federally recognized tribes. Given the current protection framework, the Special Rapporteur was concerned about the drastic reduction in the Department budget by $1.6 billion annually and in the Environmental Protection Agency budget by $2.5 million. She recommends that the current administration strongly reconsider those budget cuts which would greatly impact the living standards of indigenous peoples.

12. Engagement with indigenous communities in the United States in the context of energy development and infrastructure projects are governed by various domestic statutes, orders, regulations, policies and protocols, each of which must be consulted individually and collectively to determine any specific procedures on how federal departments and agencies should conduct "government-to-government" consultations with Indian tribes. The order that provides the most direct guidance on consultation with Indian tribes is Executive Order 13175 of 9 November 2000. It requires federal agencies to adhere to three policy-making criteria, to the extent permitted by law, including, where possible, deferring to Indian tribes to establish standards. There should also be "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

13. Since the issuance of the order, the Government of the United States has taken a number of steps to strengthen its consultation regime to ensure the protection of indigenous rights. In 2009, a Presidential memorandum was issued to enhance meaningful dialogue

[3] CCPR/C/USA/CO/4.
[4] A/HRC/16/11 and Add.1.
[5] United States of America, Executive Order 13175 on consultation and coordination with Indian tribal governments, Federal Register, vol. 65, No. 218 (9 November 2000).
[6] United States of America, Federal Register, vol. 82, No. 10 (17 January 2017), p. 4915; also 25 U.S.C., sect. 5130 (2).
[7] United States of America, Constitution, art. I, sect. 8 (3).
[8] Ibid., art. I, sect. 3.
[9] Ibid., amendment 14 (2).

between the federal Government and Indian tribes. All federal agencies were directed to develop a detailed plan of action to implement the policies and directives of Executive Order 13175.[10]

14. Despite those efforts, the order resulted in a disjointed framework that suffers from loopholes, ambiguity, ad hoc application on an agency-by-agency basis and a general lack of accountability. It has failed to ensure effective consultations with tribal governments. The breakdown in communication and lack of timely and good faith involvement in the review of federal and non-federal projects has left tribal governments unable to participate in meaningful dialogue on projects affecting their lands, territories and resources. The shortcomings of the current framework still lead to violations of the rights of indigenous peoples, most notably the right to free, prior and informed consent.

15. The Indian Mineral Leasing Act (1938) provides that "unallotted lands within any Indian reservation or lands owned by any tribe, group or band of Indians under Federal jurisdiction ... may, with the approval of the Secretary of the Interior, be leased for mining purposes".[11] Although the Act recognizes tribal sovereignty, it retains the principles of the trust responsibility by requiring that tribal mineral leases be approved by the Secretary of the Interior based on a determination of whether or not the lease is appropriate or in the best interest of the tribe.

16. The Indian Mineral Development Act (1982) was intended to provide tribes with greater autonomy in the development of natural resources on Indian lands. The Act permits tribes to enter into joint venture agreements providing for the development or sale of mineral resources in which the tribe owns an interest.[12] Entry into such agreements is subject to approval by the Secretary of the Interior, based on a determination that the agreement is in the tribe's best interest.[13]

17. The Energy Policy Act (2005) permits Indian tribes to submit to the Secretary of the Interior for approval a tribal energy resource agreement governing leases, business agreements and rights-of-way on tribal lands.[14] The Secretary has limited discretion in deciding whether to approve an agreement as it stipulates a time frame and conditions for approval,[15] including the determination that the Indian tribe has demonstrated its capacity to regulate the development of energy resources on behalf of the tribe. While such agreements provide Indian tribes with an avenue for exercising sovereignty in energy development on their lands, the approval process still gives the federal Government the final determination of tribal capacity and for some erosion of the federal trust responsibility in Indian mineral resource development.

18. The Helping Expedite and Advance Responsible Tribal Home Ownership Act (2012) created the opportunity to turn over control of the leasing of tribal lands to tribal governments. The Act removes the requirement of lease approval by the Secretary of the Interior, requiring instead only initial approval of a participating tribe's own leasing regulations. However, the Act applies to surface lands only and thus impacts the development of renewable energy projects only.

19. The history of allotment and reservation has not diminished indigenous peoples' ties to their land. Indigenous peoples seek full decision-making power over the reduced lands and resources allocated to them so that they can use their history, knowledge and expertise to manage their resources to the benefit of their communities. Indigenous peoples assert that their rights in the United States are not limited by the boundaries of their current reservations, but extend to the reaches of their ancestral territories.

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[10] United States of America, Memorandum of 5 November 2009 on tribal consultation, Federal Register, vol. 74, No. 215 (9 November 2009).

[11] United States of America, 25 U.S.C., sect. 396 (a).

[12] Ibid., sect. 2102.

[13] Ibid.

[14] United States of America, 25 U.S.C., sect. 3504 (e).

[15] Ibid.

20. In line with article 32 (2) of the United Nations Declaration on the Rights of Indigenous Peoples, section 106 of the National Historic Preservation Act (1966) requires federal agencies to take into account the effect of any federal or federally assisted undertaking on any historic property eligible for entry in the National Register of Historic Places.[16] According to the implementing regulations, federal agencies must consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by a federal or federally assisted undertaking.[17]

III. Positive measures and initiatives for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples

21. In December 2010, the United States of America declared its support for the United Nations Declaration on the Rights of Indigenous Peoples. The administration at the time took strong steps towards implementing a consultation framework by holding high-level meetings between tribal leaders and the executive branch. Since 2012, the federal Government had made commendable efforts to develop policies to effectively implement the principles set forth in the Declaration, including the adoption of the Violence Against Women Reauthorization Act (2013) and the creation of the White House Council on Native American Affairs (2013), which brings together federal departments and agencies across the executive branch to more effectively coordinate programmes for Indians.

22. In 2012, the Departments of Defence, the Interior and Energy, and the Advisory Council on Historic Preservation signed a memorandum of understanding to improve the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration.

23. On 1 March 2013, the Advisory Council adopted a plan to support the Declaration by incorporating the principles set forth therein — including free, prior and informed consent — into its programmes, policies and initiatives. It also committed to raising awareness about the Declaration within the historic preservation community and among other federal agencies.

24. The Special Rapporteur learned about various initiatives supporting the Declaration. In 2014, the Environmental Protection Agency recognized in its Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples the importance of the Declaration and the principles that were consistent with the mission and authorities of the agency.

IV. Principal human rights concerns

A. Consultation and free, prior and informed consent

25. As a universal framework setting out the minimum standards of protection of indigenous peoples' rights, the Declaration establishes the duty of States to consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before approving any project, including energy and infrastructure projects, affecting their lands or territories and other resources. Effective implementation of that principle would ensure that indigenous peoples have decision-making power over the impacts of energy development on their lands.

26. The Special Rapporteur found that the situation faced by the Standing Rock Sioux tribe was shared by many indigenous communities in the United States, as tribal communities nationwide wrestle with the realities of living in ground zero of energy

[16] United States of America, 54 U.S.C., sect. 306108.

[17] United States of America, 36 C.F.R., sect. 800 (2) (c) (2) (ii).

impact. The core objective of tribal consultation is to provide federal decision makers with context, information and perspective to support informed decisions that protect tribal interests. Prior to rendering federal decisions that have the potential to impact tribes, federal agencies must consider treaty rights, federal trust responsibility to tribes and environmental justice, along with all relevant and applicable federal statutes, regulations and policies. Meaningful consultation has the potential to provide a solid foundation for such decisions, but federal agencies and tribes must be willing to recognize those principles and to work actively and cooperatively. In some cases — such as in the context of the Dakota Access Pipeline — meaningful consultation does not occur (see paras. 63-74 below).

27. There are few examples of meaningful consultation in the context of energy development projects in the United States. One example was the section 106 review led by the Bureau of Land Management of Nine Mile Canyon, Utah, with an estimated 10,000 prehistoric rock panes etched along the 45-mile-long canyon. During the review, the Advisory Council recommended expanding the consultation with Indian tribes and other parties. As a result, a blueprint for safeguarding historic properties while allowing energy development to proceed was created in 2010.

B. Self-determination in energy development projects

28. The previous Special Rapporteur noted that "indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources which … is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights".[18] The Special Rapporteur notes that, in addition to the government-to-government relationship that is the basis of consultation, the United States has a trust relationship with Indian tribes and individual Indians for the resources and rights that the United States holds in trust, as defined by Congress. She recommends that this relationship remain the legal framework within which to build the capacity of Indian tribes to develop their own initiatives with respect to natural resources and energy. Any framework that dispenses with the trust responsibility would be detrimental to indigenous peoples given their unique status as sovereign entities and members thereof.

29. The Special Rapporteur was very impressed by the remarkable and unshakeable resolve that tribes demonstrate in finding creative ways to self-determine their energy development. In addition to rich oil and gas deposits across Montana, North Dakota, Texas, Oklahoma, Utah, Colorado, Alaska and New Mexico, indigenous lands have great wind and solar potential, as well as hydroelectric and geothermal resources. A number of tribes have made entrepreneurial efforts to create tribal utilities for the benefit of their own and neighbouring communities, and are involved in a wide array of energy generation and transmission as large parts of tribal lands serve as throughways for the national electrical grid system. Indian tribes are owners and operators of new and emerging technologies, breaking the mould of reliance on outside entities. These examples demonstrate that, by exercising political sovereignty, indigenous peoples can approach energy resource development in diverse ways to support economic sovereignty.

30. With a budget of $22 million for 2017, the Department of Energy Office of Indian Energy will provide $12 million in grants for the deployment of innovative energy systems and technologies, and $6 million in direct technical assistance; the amount has doubled since 2013 to meet increasing demand. Between 2002 and 2016, the Department of Energy invested $66.5 million in 217 tribal clean-energy projects valued at more than $126 million, with an investment of $59.7 million in tribal cost shares. One example was the grant to the Picuris Pueblo for a solar energy project in 2016 (see para. 77 below).

31. Indian tribes continue to face significant challenges in their efforts to harness the possibility of self-determined development. In particular, tribes universally reported that the legal, regulatory and tax structures currently in place created additional hurdles while

[18] A/HRC/24/41.

reducing the possibility of realizing important benefits. Of particular concern was the dual taxation regime that allow State governments to tax energy revenues derived from tribal lands without any requirement that those taxes be redeployed to serve tribal communities. This undermines tribes' self-determination as they cannot adequately protect their communities against the negative impacts of development. Whether it is repaving destroyed roads, creating adequate environmental mitigation, providing emergency response plans or bulking up the capacity of law enforcement, energy-producing tribes find themselves lacking adequate resources to manage the impacts of development.

32. The Special Rapporteur heard from tribes about their proactive approach in asserting self-determination in the development of their own comprehensive energy policies. While expecting the United States to continue to fulfil its trust responsibility to them, tribes want to empower themselves to develop their resources for the benefit of their members. Particularly in the areas of historic preservation, social and environmental impacts and emergency management planning, the Special Rapporteur considers that indigenous peoples are best placed to lead in developing energy policies that affect them.

33. The deference to be afforded to Indian tribes in the energy development context should also be recognized by other stakeholders. The Special Rapporteur recommends that energy developers consider and address the difficulties that may arise in interacting with tribes and work to understand their unique perspective as the permanent inhabitants of their lands and territories. A committed and meaningful effort towards mutual understanding by companies should serve not only to assist them in meeting their responsibilities under the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, but also to develop a productive and harmonious relationship between the tribes, companies and stakeholders.

C. Economic, social, cultural and environmental impacts of energy development

1. Sacred places threatened by energy development

34. Energy development "has not only physically impacted our homelands and the purity of our soil, air and water, it has also affected the public health, the community cohesion and the prayers and cultural practices of our people".[19] Energy and infrastructure development on and near tribal territories have unique impacts on Indian communities that cannot be calculated in environmental or economic terms only. Any exploration, extraction or remediation effort must take into account the links to the health, society, culture and spirituality of local indigenous communities.

35. While indigenous peoples have a vibrant and enduring relationship to their culture and sacred places, forced relocation and treaty renegotiation has alienated many tribes from their historical territories. Outside of indigenous control, many of these places have come under threat by energy development projects. Important examples include Chaco Canyon, Mount Taylor and Bears Ears.

36. Although designated a World Heritage Site by the United Nations Educational, Scientific and Cultural Organization (UNESCO) owing to its vast cultural resources with deep significance to the Pueblo and Navajo peoples, only the main complex of Chaco Canyon is protected by UNESCO and United States national park designations, despite the actual boundaries of the sacred place stretching miles beyond that area through sacred pathways evidencing sophisticated astronomical knowledge and which lead to other great houses that are part of the sacred place. The Chaco Canyon area contains one of the largest natural gas formations with a significant amount of crude oil. While there are no oil and gas activities within the official borders of the park, the Bureau of Land Management has issued hundreds of drilling permits in the surrounding area and recently announced a plan to review mineral leasing and development activity near the park. The review process was

[19] Janene Yazzie (Navajo Nation), statement to the Special Rapporteur during the regional consultation with the Navajo Nation, Window Rock, Arizona, February 2017.

billed as a joint effort reflecting the Department of the Interior's emphasis to work with Indian leaders, but representatives of the Bureau walked out of the first scoping meeting. On 25 January 2017, against the urging of the local indigenous population and with limited meaningful consultation, an online auction was held for oil and gas drilling leases of public lands surrounding the park. Chaco Canyon remains one of the most significant and most threatened sacred places in North America.

37. Mount Taylor is one of six Navajo sacred mountains, a site revered by the Navajo, Acoma, Laguna and Zuni Pueblos and the Hopi. Prior to its listing on the New Mexico State Register of Cultural Properties, Mount Taylor was mined extensively for uranium-vanadium between 1979 and 1990. Since then, its mine shafts have filled with water contaminated by uranium and radium. Although the site has become permanently designated as traditional cultural property, the land is still governed by the 1872 Mining Act, which permits mining regardless of impacts on cultural or natural resources, if deemed to be in the public interest.

38. In December 2016, the United States Government designated Bears Ears National Monument as sacred lands, providing indigenous peoples from the Colorado Plateau a place of subsistence, spirituality, healing and contemplation. Through its unprecedented model of co-management with local and regional tribes, the land use model allows its continued use for cultural practices for future generations utilizing indigenous traditional knowledge to protect a unique cultural and ecological landscape, including for public use. The Special Rapporteur considers that Bears Ears should serve as a model for protection and management of sacred places and was alarmed to learn that the Secretary of the Department of the Interior had recommended to President Tump to "revise the existing boundaries" of the monument in response to the executive order to review 27 national monuments across the country.

2. Health and environmental impacts

39. The Special Rapporteur noted the 30-year history of water settlement negotiations favoured by the Government and highly appreciated by indigenous peoples. In a letter to the Trump administration in January 2017, the Western States Water Council and the Native American Rights Fund urged the administration to continue to "make tribal water right settlements a priority" and committed to working with the administration to resolve issues surrounding tribal water negotiations. Over the last 30 years, the Department completed 36 water rights settlements, four of which were approved by Congress in 2016 for the Blackfeet, Pechanga, Chickasaw/Choctaw and San Luis Rey Nations.

40. For indigenous peoples, water provides lifeways and subsistence and is of undeniable spiritual significance. In Lakota, they express this belief as *Mni Wiconi*: water is life. Water stands at the forefront of environmental impacts resulting from energy development on indigenous lands. In the arid west, where a large number of extractive projects are undertaken, the substantial volumes of water used in drilling operations cause stress on surface water and groundwater supplies.

41. Contamination of underground and surface water is also a concern, with many projects threatening vital resources in water-scarce regions. Activities that compromise indigenous peoples' water supply violate their right to the enjoyment of the highest attainable standard of health, as set forth in article 24 of the Declaration. A recent study by the Environmental Protection Agency[20] found scientific evidence that activities in the hydraulic fracturing water cycle can impact drinking water resources through spills, faulty well construction, discharge into surface water or disposal into underground injection wells.

42. The Kayenta Mine located on Hopi and Navajo reservation lands threatens the Black Mesa aquifer, the primary source of drinking water for the two reservations. Contracts since the 1960s between the federal Government and the mining company allow the company to

[20] United States Environmental Protection Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, Final report, EPA/600/R-16/236F, 2016.

withdraw more than 4,000 acre-feet of water from the aquifer annually to transport coal to a processing plant through an underground slurry line. Reports indicate that significant depletion and possible contamination is present in the Black Mesa water table and that the aquifer is showing signs of continuing deterioration owing to decades of pumping.

43. One of the most emblematic cases of environmental destruction bearing on indigenous access to water was the Gold King Mine waste water spill near Silverton, Colorado, in 2015. While the Environmental Protection Agency was conducting an investigation, 3 million gallons of water contaminated with arsenic and cadmium were inadvertently released into Cement Creek and travelled down the Animas and San Juan rivers through New Mexico and across the Navajo Nation to Lake Powell in Utah. The spill caused severe damage to crops and livestock and threatened the livelihoods of farmers and ranchers. The long-term environmental and health impacts of the spill are unknown. The fact that the mine had not been operational for nearly a century underscores the dangers of present-day extractive activities on future generations of indigenous peoples. Duane Yazzie, President of the Shiprock Chapter of the Navajo Nation stated, "We are torn, we need water, but we must also preserve farms for coming generations; farming is our life, water is our life, this is our culture, our spiritual way, it's who we are."

44. Another effect of energy development that has been borne by indigenous peoples is the dramatic increase in the flaring of natural gas in the Bakken Formation in North Dakota. Because of the lack of sufficient natural gas pipeline infrastructure in the relatively new production area, many wells in the area have been forced to flare the natural gas product as a method of disposal. The various hazardous air pollutants emitted during the combustion of the gas flare, including methane, have been associated with a variety of adverse health impacts, including cancer, lung damage and other neurological defects. These impacts are being felt by the Mandan, Hidatsa and Arikara Nation and surrounding communities. The Special Rapporteur heard testimonies from indigenous peoples that, despite the possible negative health impacts from gas flares, they would not even consider leaving their ancestral lands.

45. Uranium mining continues to have a dark legacy of environmental impacts on Indian tribes, particularly their water supply. Fuelled by the Cold War, uranium production boomed in the 1960s particularly in the southwestern United States and impacts of decades-old unreclaimed mines still linger in the form of severe water pollution. According to the Uranium Mine Location data of the Environmental Protection Agency, to date, approximately 15,000 uranium mines exist in the United States, about 4,000 of which are currently active. According to the 2012 census, 13 of the states with the highest percentage of Indian populations are in the western United States; over 161,000 abandoned hardrock mines can be found in 12 western states,[21] 10,000 of which mined uranium. Although reservations cover only 5.6 per cent of the western United States, one in five uranium mines is located within 10 km of an American Indian reservation, with more than 75 per cent (over 3,200 of 4,600) being within 80 kilometres.

46. Through its Superfund programme established as the Comprehensive Environmental Response, Compensation and Liability Act (1980) to fund the clean-up of sites contaminated by hazardous substances and pollutants, the Environmental Protection Agency has performed remediation work on more than 500 abandoned uranium mines on the Navajo Nation; 30 million tons of uranium ore had been extracted during the Cold War on or adjacent to Navajo lands.

47. The Special Rapporteur was pleased to note that each federal agency has been ordered to "make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations ... in the United States and its territories and possessions".[22]

[21] United States of America, General Accounting Office, 2014.

[22] United States of America, Executive Order 12898, Federal Register, vol. 59, No. 32, 7629 (16 February 1994).

48. When resources are extracted from indigenous territories, the people living in those territories experience attendant health impacts. In the 1900s, private companies employing Navajo workers ignored or failed to communicate the known health risks of exposure to uranium. Workers, women and children living near the mines still suffer from high rates of lung disease and cancer. In January 2017, the United States and the Navajo Nation entered into an historic settlement agreement to clean up 94 abandoned uranium mines on the Navajo Nation. Under the settlement, which was valued at over $600 million, Freeport-McMoRan's subsidiaries would perform the work and the United States would contribute approximately half the cost. In total, $1.7 billion is now available to begin the Superfund clean-up process at over 200 of the 523 abandoned uranium mines on or near the Navajo Nation. Health impacts were also addressed with the adoption in 2008 of a five-year plan to clean up uranium contamination on the Navajo Nation.[23] In addition to uranium mining, oil development can also impose health impacts on human populations. Mounting evidence of the negative effects of oil development on health includes a study by the Colorado School of Public Health, which found that babies born of women living in the area with the highest density of wells were twice as likely to have neural tube defects and a 38-per-cent increased risk of congenital heart defects.[24]

49. Despite the known environmental and health risks associated with active and abandoned uranium mines with remediation lifetimes of 200 to 1,000 years, with regard to control for disposal sites and uranium tailings sites, respectively,[25] permits have been issued for new uranium projects near the Grand Canyon. In addition to the risks of environmental degradation, the mine poses environmental risks to the Navajo owing to the inevitable transport of uranium across Navajo lands. Despite the 2005 Navajo Nation ban on uranium mining and milling, under United States law the tribe cannot legally prevent the transportation of this hazardous material through their reservation. Areas such as the Diné community (Navajo) of Cameron continue to face high rates of cancer and poisoned drinking water from abandoned mines.

50. San Ildefonso Pueblo faces risks of water contamination from the bordering Los Alamos National Laboratory, the birthplace of the atomic bomb. For nearly two decades in the 1900s, the facility flushed contaminated water into the nearby Sandia Canyon. The runoff has created a mile-long flow of contaminated groundwater extending downward and outward from a specific source and migrating towards the reservation, threatening a major aquifer that is the tribe's main water supply. The project has already caused environmental damage to sacred places outside of present-day reservation boundaries.

51. Environmental impacts on Indian tribes are not restricted to extractive energy projects. Initiatives to increase the production of hydroelectric power have also had irreversible consequences for tribes. One of the most destructive impacts was the 1944 Pick-Sloan project to construct and operate several dams to control flooding. The dams constructed on the Missouri River submerged over 356,000 acres of Indian lands and devastated precious resources. Displaced indigenous peoples relocated to barren lands as their fertile soils, timber supplies and abundant wildlife were destroyed by the flooding.

52. Lake Oahe, one of the reservoirs created by the Pick-Sloan project, has been prominent in the Dakota Access Pipeline controversy. A portion of the pipeline route passes approximately 100 feet beneath the bottom of Lake Oahe, which is a major source of drinking water for residents of the Standing Rock Sioux Reservation. They claim that they and other affected tribes were not properly consulted about the environmental impacts of a potential spill.

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[23] United States Environmental Protection Agency, "Health and environmental impacts of uranium contamination in the Navajo Nation", Five-year plan, 2008.

[24] See http://naturalsociety.com/proximity-natural-gas-wells-ups-risk-birth-defects-says-study/#ixzz43O4VYskH.

[25] United States Environmental Protection Agency, *Technical Report on Technologically Enhanced Naturally Occurring Radioactive Materials from Uranium Mining*, Vol. 1: Mining and reclamation, background, 2008. Available at https://www.epa.gov/sites/production/files/2015-05/documents/402-r-08-005-v1.pdf.

53. The proposed Keystone XL pipeline project also threatens harmful environmental conditions on tribal lands despite procedural requirements for assessments of environmental impacts. Pursuant to the National Environmental Policy Act (1970), the Department of State Bureau of Oceans and International Environmental and Scientific Affairs issued an environmental impact statement identifying the Cheyenne River Indian Reservation and the Rosebud Indian Reservation as areas that stood to be affected by the project. The Special Rapporteur is concerned about the potential impacts to indigenous peoples that may result from the Presidential memorandum of 24 January 2017 inviting TransCanada to resubmit its construction and operation permit application to the Department of State and directing the Secretary of State to expedite the review process. She fears that tribal interests are even more likely to be ignored in the expedited review process.

3. Sexual and gender-based violence

54. The Special Rapporteur was pleased to learn about the progress made in the implementation of the Violence Against Women Reauthorization Act (2013), adopted following the visit of the previous Special Rapporteur in 2012.[36] The Act was intended to address flaws in the jurisdictional framework in Indian country which left acts of domestic and dating violence perpetrated by non-indigenous persons unprosecuted. The Act enables tribes to exercise "special domestic violence criminal jurisdiction" over non-Indian perpetrators who commit crimes of domestic or dating violence or violation of certain protection orders in the Indian country of the participating tribe. As a result, in 2016, the Department of Justice Office of Violence Against Women received its first appropriation of $2.5 million to implement the grant programme which enabled seven tribes to exercise the new special domestic violence criminal jurisdiction. Additional policy tools under the Act increased the number of federal prosecutions of 122 defendants in 2015 and, in that year also, prosecutors obtained 20 convictions out 28 cases filed against defendants in Indian country under the domestic assault by a habitual offender statute.

55. The strength of indigenous peoples in the United States is in large part measured by the vitality of their communities. Indigenous communities are at their strongest when women and girls have full and free access to social, cultural, spiritual and political institutions. As the Special Rapporteur noted in her thematic report on the rights of indigenous women and girls,[37] the history and pattern of violence against indigenous women and girls have long hindered their ability to fully realize their rights in all domains for several reasons. First, the history of colonization and, in the United States, the history of establishing Indian communities in extremely rural and under-resourced areas, has in many respects allowed violence against indigenous women to occur without adequate response, ability to report or access to effective redress. Second, indigenous women often experience multiple and intersecting forms of discrimination and marginalization based on their gender, class, ethnic origin and socioeconomic circumstances.

56. Taking into account the principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples, the rights of women and girls must be specifically considered in the context of energy development and resource extraction because of their importance as the backbone of indigenous societies, as well as their increased risk of experiencing poverty, abuse, historical trauma and lack of access to education.[38] While there is a long history of exploitation of Native women and girls that goes hand in hand with resource development on Indian lands in the United States, the Special Rapporteur's comments in the present report refer specifically to situations occurring during periods of rapid development.

57. The Fort Berthold Indian Reservation, home to the Mandan, Hidatsa and Arikara Nation, sits on the Bakken Formation, one of the most productive development regions in recent years. Rapid development of the Bakken Formation since 2011 has attracted thousands of oil workers to North Dakota. One of the effects of the influx of oil and gas

[36] A/HRC/21/47/Add.1.

[37] A/HRC/30/41.

[38] United Nations Declaration on the Rights of Indigenous Peoples, arts. 21-22.

workers to the area has been a dramatic increase in violent crime, generally, and a notable increase in trafficking of Native women and children.

58. Unfortunately, due to the complex legal regime applied to criminal jurisdiction on Indian lands, the Mandan, Hidatsa and Arikara Nation, like the majority of tribes in the United States, has limited ability to prosecute non-Indian perpetrators of crimes on their lands. In addition, the rapid pace of development quickly and critically overwhelmed the tribe's existing infrastructure, which was unable to provide law enforcement, victim support and social services to keep pace with the increase in crime on the almost one-million acre reservation. Many residents reported that they felt unsafe in their own homes. At the most basic level, development took place without consideration of the unique communities at Fort Berthold and created an unsafe and unstable environment for families on the reservation.

59. Sadly, this is a pattern that is being repeated in other indigenous communities. With the launch of oil and gas exploration on their territories and evidence of trafficking of Navajo women in and out of their communities, members of the Navajo Nation are deeply concerned about the increase in sexual violence in their territories.

60. While the trafficking of indigenous women and children is hardly a new phenomenon, there is little recognition by public and private stakeholders about affirmative actions that they can take to protect women in communities where energy development catalyzes an increase in sexual violence. According to the preliminary findings of a study funded by Department of Justice[29] that examined the spike in oil development in North Dakota and Montana in relation to domestic and dating violence, sexual assault and stalking, cities near the epicentre of the oil boom showed an increase in the average number of domestic violence victims, with the Bakken region evidencing certain officially reported offences at a rate that was significantly outpaced by population growth. Factors relating to the oil industry that have contributed to the increase in sexual and gender-based violence include the scarcity of affordable housing, the intensity of working hours followed by time off for oil workers who often do not relocate with their families — which leads to separation anxiety for the workers, their partners and the communities —, increased availability of illicit drugs and increased demand for social services that are often unmet by supply.

61. The Special Rapporteur was informed by several interlocutors that oil and gas leasing approvals issued by the Bureau of Indian Affairs do not adequately consider the safety and welfare impacts of extractive industry projects on indigenous women and children. A few minimum steps that corporations should take to ensure the safety of communities in which they are operating would be to ensure that all their employees comply with sex offender registration rules, to provide their workers with adequate housing so as not to create "man camps" that are heavily associated with sex trafficking and illegal prostitution, to provide verifiable addresses to law enforcement and emergency services and to work with the tribes concerned to ensure that local capacity will not be unduly taxed by the short-term influx of workers to the area. Taking these small steps would not only give companies true social licence to operate, but would ultimately establish their conformity with the Guiding Principles on Business and Human Rights.

62. The establishment of mechanisms to adequately consider the social values and socioeconomic status of indigenous communities, including the situation of women and girls, would go a long way to increasing their long-term health and well-being. Even a short-term spike in violence against women cuts against the strength and vitality of indigenous communities. That, in turn, exacerbates the experience of historical trauma within families cumulated in part as a result of the largely discriminatory policies of the Government towards indigenous peoples since the first contact, and which, today, still results in distrust of government initiatives. The federal Government and private companies should recognize these patterns and integrate existing frameworks to consider the social

[29] Dheeshana S. Jayasundara and others, "Exploratory research on the impact of the growing oil industry in North Dakota and Montana on domestic violence, dating violence, sexual assault, and stalking: a final overview", University of North Dakota, November 2016.

impacts of development as well as spur tribally self-determined energy projects that operate within beneficial community standards.

V. Emblematic case relating to the Dakota Access Pipeline[50]

63. The Special Rapporteur closely reviewed the situation around the Dakota Access Pipeline, which highlights the shortcomings in the United States' policy on consultation. The 1,168-mile-long pipeline intersects the treaty reservation and traditional territories of the Great Sioux Nation, running near the Missouri River, upstream of the water supply of numerous tribal nations. A portion of the pipeline runs 100 feet under Lake Oahe, half a mile north of the Standing Rock Sioux Reservation and 70 miles north of the tribe's water supply intake.

64. As prescribed by the National Environmental Policy Act, the Army Corps of Engineers drafted an environmental assessment of the project, which failed to identify or address the concerns of the Indian tribes located directly downstream of the pipeline. Maps in the draft assessment initially omitted the reservation or the fact that the pipeline would cross the historic treaty lands of a number of tribal nations. During its meeting with the Special Rapporteur, the Army Corps confirmed that it had held numerous consultations between October 2014 and July 2016 and between September 2016 and February 2017 but, despite attempts to contact affected Indian tribes, it was unable to hold the required consultations with them. On the other hand, affected Indian tribes, including the Standing Rock Sioux, explained that, in their view, the attempted contacts were not made sufficiently early in the process but rather after the decisions regarding various aspects of the pipeline had been made, including its route, with limited consideration for sacred sites or the potential impact to their drinking water.

65. It was claimed that the Army Corps did not respond to a request by the Standing Rock Sioux tribe for an archaeological survey to be carried out by tribal archaeologists. The Corps stated that, given the limits of its jurisdiction, it lacked the authority to require the project proponent to conduct an archaeological survey of the pipeline route. The Advisory Council on Historic Preservation had alerted the Army Corps to the reservations expressed by the affected tribes and requested that the Army Corps consider under its section 106 considerations not only the 209 various water crossings under its responsibility for licencing obligations, but the entire pipeline project.

66. In its consultation policy dated 1 November 2012, the Army Corps stated that, "to the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages before decisions are made and actions are taken".[51] The Army Corps explained to the Special Rapporteur that only 3 per cent of the pipeline route was under the jurisdiction of federal authority. It claimed that the impacts on the 200 wetlands and water crossings were temporary and insignificant therefore no environmental impact statement was needed to grant the easement. The Army Corps also pointed out that, following the Standing Rock Sioux's request to Energy Transfer Partners, the company took steps to address the pipeline safety control concerns of the tribe by adding 36 additional terms and conditions to the project. This information, which is now public, was recently made available to the tribes.

67. While the issue galvanized many people across the globe in support of the affected tribes, including a proliferation of self-interested native and non-native groups, violence escalated as a result of clashes between local, private security forces and protestors. The Chairman of the Standing Rock Sioux Reservation, David Archambault II, noted blockades on the northbound highway 1806, hindering the passage of emergency vehicles to local hospitals and delaying medical care to injured people. The blockade also hindered access to the casino, which negatively impacted that source of income for the Standing Rock Sioux.

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[50] See A/HRC/34/75, communications sent: USA 14/2016 and USA 7/2016, available from http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

[51] See http://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf.

68. While many of the circumstances surrounding the protest constitute examples of poor practices, there were also a number of positive developments. The Chairman of the Standing Rock Sioux Reservation stated that the protest brought together all seven bands of the Great Sioux Nation for the first time in the last 150 years and galvanized indigenous peoples nationally and from around the globe, who came by the thousands to show their support for the Standing Rock Sioux and other affected tribes.

69. Another positive development was the series of consultations held by the federal Government with Indian tribes to better integrate tribal views on infrastructure decisions. The consultations[32] sought to better inform federal agencies about tribal involvement in decision-making that implicates their rights and resources. In December 2016, the Army Corps announced that it would conduct a full environmental review of the pipeline's impacts to determine the basis on which to grant the final easement needed to complete the pipeline.

70. These positive steps were overshadowed when newly-elected President Donald Trump issued a memorandum which called for the expedited review and approval of the Dakota Access Pipeline, circumventing the ongoing environmental review. The Army Corps executed the President's directive, cancelled the environmental impact statement and granted the last easement necessary to begin construction of the pipeline under Lake Oahe. On 1 June 2017, the pipeline became fully operational, transporting oil through traditional tribal lands and underneath the water supply of the Sioux tribes.

71. The tribes continued to battle for the protection of their rights in domestic courts and in June 2017, a United States Federal Court agreed with the Standing Rock Sioux that the Army Corps had not adequately considered environmental justice issues nor the risk of oil spill, which could have impacts on treaty reserved hunting and fishing rights. The Special Rapporteur will continue to monitor the situation and expresses concern that issues raised by the tribes remain unresolved.

72. As is well-documented, the controversy surrounding the Dakota Access Pipeline drew thousands of people to the boundaries of the Standing Rock Sioux Reservation as they sought to protect their land and water and uphold tribal sovereignty. While the actions that took place were mostly non-violent and peaceful, there has been a militarized, at times violent, escalation of force by local law enforcement and private security forces. The previous Special Rapporteur noted that indigenous peoples had the right to oppose extractive activities that impacted their land and resources, free from reprisals, acts of violence or undue pressure to accept or enter into consultations about extractive projects.[33]

73. The Special Rapporteur noted with particular concern the aggressive manner in which peaceful demonstrations were met by local, state, private and national guards. She heard testimonies of war-like conditions and cases of blunt force trauma and hypothermia as a result of battery with batons, attack dogs and water cannons blasting individuals at freezing temperatures. She was concerned about protestors being strip searched and placed in kennels as temporary holding cells during various and frequent mass raids by local, state and federal enforcement officials, sometimes in the middle of a spiritual and cultural energy cleansing ritual. According to information received, over 700 indigenous and non-indigenous people were arrested during the protests, some of whom remain in custody.

74. Given the impacts of the Dakota Access Pipeline on indigenous peoples, the Special Rapporteur remains deeply concerned by the Presidential memorandum of 24 January 2017, which resulted in the granting of the last easement necessary to begin construction of the Dakota Access Pipeline under Lake Oahe and the Notice of Termination of the Intent to Prepare an Environmental Impact Statement.

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[32] United States of America, Department of the Interior, the Army and Justice, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, January 2017. Available at https://www.hsa.gov/sites/default/files/publications/publication-sb2-0030.pdf.

[33] A/HRC/24/41.

VI. Best practice

A. Self-determined energy development projects

75. Notwithstanding legislation curtailing self-determined development by Indian tribes, a number of companies, owned and operated by indigenous peoples have thrived and continue to thrive in the current environment.

76. Indigenous communities want more control over their energy resources as a part of their overall desire for self-determination. The tribes rely on income generated from natural resources not only to support critical government programmes, but also to reconcile the protection of their lands, waters and sacred places with the benefit of revenue and jobs. To that end, tribes are committed to balancing different sets of concerns through their own approaches to energy development, including renewable energy resource development as a viable alternative to extractive industry development.

77. The Picuris Pueblo, a federally recognized tribe in New Mexico has engaged in a collaborative venture with intertribal authorities and the federal Government to build a one-megawatt solar panel. Under the auspices of the Department of Energy Office of Indian Energy, teams of technical experts provided customized legal, financial and technical support, working directly with the tribal team and ensuring respect for tribal sovereignty while building the capacity of tribal members. The solar project will make the Picuris Pueblo the first 100-per-cent-solar-powered tribe in the United States and will save them almost $6.5 million over the 25-year lifespan of the project.

78. Similarly, the Oceti Sakowin Power Authority is a cooperative venture of seven Sioux tribes in the Great Plains, comprising the Cheyenne River, Crow Creek, Flandreau Santee, Oglala, Rosebud, Standing Rock and Yankton tribes, which will produce up to 2 gigawatts of electricity generated by wind power. It will be one of the largest wind power developments in the country. The tribes battle extreme poverty and many of them face 80 per cent or higher unemployment rates on their reservations. They aim not only to increase access to electricity and funding for infrastructure projects, but to create job opportunities and assist in community development.

79. The Mandan, Hidatsa and Arikara Nation formed Missouri River Resources, a wholly-owned tribal company that generates economic benefits for the tribal community through responsible oil development. Missouri River Resources employs tribal members and industry experts, with the majority of its employees from the Fort Berthold Reservation. This is one example of an indigenous company operating within reservation lands and employing members of its own tribe, which is less likely to engage in unlawful disposal of energy by-products in close proximity to homes in order reduce driving time and fuel costs to reach remote areas.

80. Since 1992, the Red Willow Production Company, a $2-billion company owned and managed by the Southern Ute Tribe, has been generating revenue through oil and gas development on their reservation for the benefit of tribal members. Utilizing changes in the domestic oil and gas law, in 1995, Red Willow took over the operation of 54 wells on tribal land that were previously operated by non-indigenous companies.

B. Education

81. Indian tribes are committed to maintaining and improving healthy and vibrant indigenous communities in line with their sacred duty to protect their children. Successful and self-determined economic development can be a key driver to achieving those goals. The Special Rapporteur visited Sitting Bull Tribal College on the Standing Rock Sioux Reservation and the United Tribes Technical College in Bismarck, North Dakota, two of many tribal colleges that have partnered with state and federal stakeholders to create spaces not only for academic excellence and learning, but for cultural revitalization. Students at Sitting Bull College testified that the unique and supportive space provided by the college community allowed them to explore their indigenous identity as a foundation for their

careers. Tribal colleges across the country are vital centres of cultural identification and many include language nest programmes that provide children with language and cultural immersion opportunities. Their indigenous identity thus becomes a strong foundation for generations to come.

82. A crucial aspect of self-determined development is the ability to build tribal capacity to manage lands, territories and resources. Tribal colleges provide individuals with the resources to gain technical skills in fields such as environmental sciences and to ensure access by indigenous youth to education and careers while maintaining indigenous values at the forefront. The Special Rapporteur notes that if one can change the landscape of education and increase cultural learning, it would go far in improving tribal communities. Government support toward these valuable resources needs to be ensured.

VII. Conclusion and recommendations

A. Conclusion

83. **The issues surrounding energy development in the United States of America underscore the need for reconciliation between the federal Government and indigenous peoples. Tribal leaders and representatives indicate that they are interested in engaging in a programme of reconciliation to remedy the harms they have faced and to improve the government-to-government relationship moving forward. Such a programme would acknowledge the historical wrongs inflicted upon the indigenous peoples of the United States and confront systemic barriers that prevent the full realization of indigenous peoples' rights.**

84. **Encouraging steps are being taken by federal agencies to implement the United Nations Declaration on the Rights of Indigenous Peoples in consultation policies. For example, the Advisory Council on Historic Preservation issued guidance to federal agencies on how to incorporate the principles set forth in the Declaration when carrying out the Section 106 review under the National Historic Preservation Act, including developing working knowledge of the Declaration and its articles, reviewing and updating agency policies to reflect the principles contained in Declaration and considering the Declaration as a policy reference in the Section 106 process and beyond.**

85. **However, despite the recommendations made by the previous Special Rapporteur following his visit to the United States in 2012,[34] significant work still needs to be done to implement policies and initiatives to further the rights of indigenous peoples in that country. Many of the recommendations made by the previous Special Rapporteur, especially those dealing with the right of indigenous peoples to self-determination and consultation on matters that directly concern them have yet to be realized.**

B. Recommendations

Federal law and policy

86. **The federal Government should:**

(a) Adopt policies to acknowledge and encourage the adherence of its treaty obligations and establish a national body for oversight of international treaty obligations with full and effective participation of indigenous peoples on issues relevant to them;

(b) Bring policies in line with, and ensure that, human rights pronouncements made at the federal level are implemented at the local level;

[34] A/HRC/21/47/Add.1.

(c) **Seriously reconsider proposed budget cuts to the Environmental Protection Agency and the Department of the Interior, which would greatly impact the living standards of indigenous peoples in the United States of America;**

(d) **Incorporate the United Nations Declaration on the Rights of Indigenous Peoples into domestic law through statutes and regulations;**

(e) **Educate federal agencies and state and local Governments on the Declaration;**

(f) **Allow tribes to obtain funding directly from the federal Government rather than through regional offices.**

Self-determination, the duty to consult and free, prior and informed consent

87. **Consent, not consultation, should be the policy to allow for the government-to-government relationship necessary to fulfil the principles set forth in the Declaration. As such, the federal Government should:**

(a) **At the minimum, identify requirements for meaningful consultation with indigenous peoples with a view to implementing a consistent system across all federal agencies, in consultation with indigenous peoples, on issues that could affect their rights as self-determined sovereign nations;**

(b) **Approach tribes as individual sovereign nations and give tribes a seat at the table with equal authority and equal rights;**

(c) **Undertake consultations between high-level decision makers in both federal and tribal Governments to ensure the scope necessary to identify social, cultural and environmental impacts;**

(d) **Continue to improve upon policies to develop stronger government-to-government relations with tribes. At a minimum, federal agencies should adhere to the consultation policy set forth in Executive Order 13175;**

(e) **Take steps to consider fully and implement the proposals in the 2017 report, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*;**

(f) **While honouring the treaty obligations to tribes and trust obligations to tribes and individual Indians with respect to resources and rights held in trust for them, continue to support tribes in developing their capacity and resources towards attaining self-determination in all areas, including energy development and law enforcement.**

Environmental impacts

88. **The federal Government should:**

(a) **Conduct a thorough assessment of environmental impacts of infrastructure projects, taking into account impacts on indigenous peoples;**

(b) **Require a full environmental impact statement on all extractive industry projects affecting indigenous peoples, regardless of the status of the land;**

(c) **Duly provide protocols for sharing confidential and proprietary information necessary for indigenous peoples to fully assess the proposed project, including all relevant impacts on them, on and off reservation lands;**

(d) **Initiate consultations at the outset of all projects so as to include tribes in the planning process, with proper identification and notification of all potentially affected indigenous peoples as soon as the federal agency becomes aware of a project requiring federal approval. Detailed information about the potential scope, purpose and location of the entire project should be duly provided for potentially affected indigenous peoples to evaluate and determine whether they have an interest in seeking formal consultation with the federal agency. Federal agencies should take proper steps to discuss, at the concept stage of energy projects, measures to mitigate impacts on**

tribes. Provide technical assistance and adequate access to funding to indigenous peoples to ensure their meaningful participation in evaluating the extent to which a project could significantly affect them and to support them in their substantive preparation for consultations. Continue to work with indigenous peoples to understand their relationship with the land and indigenous knowledge of their ecosystem.

(e) Ensure indigenous peoples have full access to redress for violations perpetrated on and against their lands and territories, including access to judicial forums to dispute claims and to concrete and timely assistance to mitigate adverse impacts on environmental and cultural resources. Adopt policies to ensure that mechanisms for future redress and remediation are clearly articulated during the initial consultation period between tribal, state and federal government actors;

(f) Take appropriate measures to encourage consideration of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework by all actors in any project that impacts indigenous peoples in the United States. Equally, take measures to encourage private corporations working on tribal lands to follow the Guiding Principles, including adequate consideration and provision of remediation in advance of project commencement;

(g) Reinstate the Environmental Impact Statement process for the Dakota Access Pipeline, in close cooperation with tribes, to fully consider the environmental, economic, social and cultural impacts to indigenous peoples, particularly in the light of the 14 June 2017 ruling by a federal court that federal permits authorizing the pipeline to cross the Missouri River just upstream of the Standing Rock Sioux Reservation violated critical aspects of the law;

(h) Continue to address the effects of uranium mining and abandoned uranium mines near reservation lands and provide proper compensation to those indigenous peoples affected by environmental disasters, including from the Gold King Mine spill in August 2015;

(i) In the light of issues relating to climate change, provide more support for the development of renewable energy projects and programmes with the full participation of indigenous peoples;

(j) Consider adopting legislation to enforce consultation for all projects that impact the traditional territories of local indigenous communities, in particular energy and infrastructure projects undertaken within indigenous peoples' traditional territories and on lands not currently owned by them;

(k) Enact legislation to ensure that Tribal Historic Preservation Officers have the ability to provide early and continual input into project proposals to ascertain the advancement of healthy indigenous communities and the completion of beneficial energy projects.

Places of cultural, religious and historical significance

89. **The federal Government should adopt legislation to amend existing laws governing the protection of sacred and cultural places beyond present-day reservation boundaries so as to further protect the religious freedoms of indigenous peoples. The policies should reflect the vision of indigenous peoples' definition of sacredness as an interconnected landscape with unique relationships to the practice of religions, strengthening of community, livelihoods, subsistence and gathering of traditional medicines and resources.**

Violence against women

90. **The Special Rapporteur commends the Government on the adoption of the Violence Against Women Reauthorization Act (2013) and encourages it to continue its efforts, including by strengthening legislation, to empower indigenous peoples to assert their own jurisdiction to adequately protect their members by providing them**

with additional funding to courts and law enforcement. In that regard, she also urges the Government to seriously consider mandating sexual assault protocols.

Health impacts of energy development

91. **The federal Government should continue to support indigenous peoples in developing their capacity to address the health impacts of energy projects and provide them with additional services for the treatment of mental health, alcoholism and drug addiction, including drug rehabilitation services and hospitals.**

Education

92. **The federal Government should continue to support tribal colleges with adequate tax incentives, education grants and financial resources to empower indigenous peoples to realize their self-determined economic development goals in line with the United Nations Sustainable Development Goals.**

Criminalization of indigenous dissent

93. **The federal Government should develop and provide anti-oppression and anti-racism training to federal and state law enforcement agents; collect disaggregated data to reflect the rate of incarceration of indigenous peoples at both the federal and state levels; mandate the Department of Justice to open an investigation into the excessive use of force and militarized response to the water protectors at the Standing Rock Sioux Reservation, including the use of non-lethal weapons; consider granting clemency to Leonard Peltier.**

94. **The state Governments should prohibit state taxation of lands held in trust for the benefit of indigenous peoples. Where states impose taxes on Indian lands, such tax revenues should be re-invested into tribal lands to provide infrastructure and services.**

95. **Indigenous peoples should continue to develop policies to take control of renewable and non-renewable energy development and guidelines for doing business to facilitate tribal development. They should work with other indigenous peoples in other parts of the world on issues of common concern; go beyond formal engagements with members of the federal Government and develop personal relationships with them; and negotiate agreements for energy development on their own terms.**

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Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the rights of indigenous peoples, in which she examines the human rights situation of Aboriginal and Torres Strait Islander Peoples, on the basis of her visit to Australia from 20 March to 3 April 2017.

In the report, the Special Rapporteur observes that the policies of the Government do not duly respect the rights to self-determination and effective participation; contribute to the failure to deliver on the targets in the areas of health, education and employment; and fuel the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islanders.

A comprehensive revision of those policies needs to be a national priority, and the consequences and prevalence of intergenerational trauma and racism must be acknowledged and addressed.

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Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*

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* Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on the rights of indigenous peoples visited Australia from 20 March to 3 April 2017. She expresses her appreciation to the Government of Australia for the support provided throughout the visit.

2. During the visit, the Special Rapporteur met with high-level representatives of the federal, state and territory governments, members of Parliament, the Parliamentary Joint Committee on Human Rights, members of the judiciary, the National Congress of Australia's First Peoples, the Australian Human Rights Commission and a broad range of Aboriginal and Torres Strait Islander organizations and representatives and civil society organizations working for their rights.

3. The Special Rapporteur held meetings in Western Australia, the Northern Territory, Queensland, the Australian Capital Territory, Victoria and New South Wales. She met with a number of indigenous communities, including in Broome, Darwin and the Torres Strait, to hear directly from indigenous peoples about their concerns and priorities. She also visited two detention facilities, Bandyup Women's Prison in Perth and Cleveland Youth Detention Centre in Townsville, and the Children's Koori Court in Melbourne.

4. Among the priorities for the visit, the Special Rapporteur reviewed the progress made in implementing recommendations made by her predecessor during his country visit to Australia in 2009 (A/HRC/15/37/Add.4), noting at the outset the limited progress that had been made by the Government to implement those recommendations.

II. Background on Aboriginal and Torres Strait Islander peoples

5. The history of the continent's first inhabitants, the Aboriginal Australians, goes back more than 50,000 years before the arrival or European settlers. At the time of colonization in 1788, it is estimated that 750,000 to 1,000,000 people lived in Australia.

6. British settlers declared the land "terra nullius" as they considered that Aboriginal Australians were nomads with no concept of land ownership. The loss of traditional land, food sources and water resources was often fatal, particularly to communities already weakened by disease. Aboriginal Australians groups had a deep spiritual and cultural connection to the land. When they were forced away from traditional areas, the cultural and spiritual practices necessary to their cohesion and well-being were destroyed.

7. During colonization, Aboriginal Australians were murdered, raped and enslaved for forced labour. Massacres occurred across Australia and, in the course of frontier conflict, it is estimated that about 2,000 British colonizers and over 20,000 indigenous Australians suffered violent deaths.[1]

8. Aboriginal people were moved to mission stations under assimilation policies to be taught European beliefs and used as cheap labour. The term "Stolen Generations" refers to Aboriginal and Torres Strait Islander children who were forcibly removed from their families and communities by government, welfare or church authorities and placed into institutional care or with non-indigenous foster families. The forced removals began around the mid-1800s and continued until the 1970s.

9. In 2008, the federal Government formally apologized to the Aboriginal and Torres Strait Islander Peoples and particularly to the Stolen Generations for the grief and suffering inflicted by laws and policies of successive Parliaments and Governments.

10. Today, indigenous peoples are estimated to constitute approximately 3 per cent of the Australian population, or 670,000 individuals. More than 400 distinct indigenous Australian peoples have been identified through their ancestral languages. The largest

[1] See http://aiatsis.gov.au/explore/articles/first-encounters-and-frontier-conflict.

indigenous populations live in the States of New South Wales and Queensland. Aboriginal and Torres Strait Islanders comprise 30 per cent of the population of the Northern Territory, the highest proportion of any state or territory. While Aboriginal and Torres Strait Islanders are more likely to live in remote rural parts of the country than the non-indigenous population, the majority of the indigenous population today lives in urban areas.

11. Stark disparities and social disadvantage persist between indigenous and non-indigenous Australians across all quality of life indicators.[2] Indigenous Australians generally experience significantly lower standards of health, education, employment and housing, and are drastically overrepresented compared with non-indigenous people in the criminal justice system, among children in out-of-home care and among victims of family violence. The Special Rapporteur deeply regrets that many of those indicators have deteriorated significantly since her predecessor's 2009 visit, and that numerous innovative and effective indigenous community-led initiatives established in recent years remain underfunded.

III. International human rights instruments and mechanisms

12. Australia has ratified most international human rights treaties. However, it has yet to become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

13. The Government has publicly indicated its intention to ratify before the end of 2017 the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it signed in 2009.

14. In 2009, Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples. It has not ratified the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169).

15. Australia still maintains reservations to article 10 of the International Covenant on Civil and Political Rights on the humane treatment of people deprived of their liberty and to article 37 (c) of the Convention on the Rights of the Child on juvenile justice. According to the reservations, Australia restricts acceptance of its obligation to separate accused persons from convicted persons and to separate children from adults in prison.[3] The reservations have been maintained despite repeated calls for their withdrawal by the Human Rights Committee and the Committee on the Rights of the Child.[4]

16. In November 2015, the domestic rights record of Australia was reviewed for the second time as part of the universal periodic review. While the Government affirmed that it would ensure that laws and practical actions gave effect to the aims of the Declaration, it did not accept the recommendations to develop a national strategy to implement it.[5]

IV. National legal and institutional framework

17. The Australian Federal Constitution came into effect on 1 January 1901. It explicitly discriminated against "aboriginal natives" by excluding them from population counts. That reference was removed by a decision supported by a 90 per cent majority of the electorate in the 1967 referendum, which also amended the Constitution to allow the Federal

[2] www.aihw.gov.au/aboriginal-and-torres-strait-islander-peoples.

[3] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

[4] See CRC/C/AUS/CO/4, para. 10, and CCPR/C/AUS/CO/5, para. 9.

[5] See A/HRC/31/14, paras. 136.85-136.87, and A/HRC/31/14/Add.1, paras. 23-28 and 138.

Parliament to legislate for "people of any race for whom it is deemed necessary to make special laws". The Constitution contains few provisions for the protection of human rights, and only five explicit provisions on individual rights.[6]

18. Each of the six states and two territories in the Federation has its own parliament, government and laws. Each of the states have constitutions that recognize Aboriginal peoples, and the Queensland constitution specifically also recognizes Torres Strait Islander peoples.

19. The Council of Australian Governments is an intergovernmental entity, chaired by the Prime Minister, comprising the federal, state and territory governments. Its role is to manage matters of national significance or matters that need coordinated action by all Governments of Australia.[7] The "Closing the Gap" strategy on reducing indigenous disadvantage in health, education and unemployment was adopted jointly by the Council in 2008 and enjoys bipartisan support. The Prime Minister presents an annual national progress report to Parliament.[8]

20. The Australian Human Rights Commission is an independent national human rights institution with statutory responsibilities under the federal Australian Human Rights Commission Act 1986, the Racial Discrimination Act 1975 and the Native Title Act 1993. The Aboriginal and Torres Strait Islander Social Justice Commissioner monitors the enjoyment and exercise of human rights for indigenous Australians and tables an annual report in Parliament.[9] On 1 April 2017, the Special Rapporteur was delighted to meet with June Oscar, the first indigenous woman to take up the position of Aboriginal and Torres Strait Islander Social Justice Commissioner.

21. The Parliamentary Joint Committee on Human Rights is established by the Human Rights (Parliamentary Scrutiny) Act 2011. Its main function is to examine all bills and legislative instruments for compatibility with the seven core human rights treaties to which Australia is a party, and to report to Parliament on its findings.[10] The Special Rapporteur was pleased to meet with the Committee members and discuss with them their important findings in their review of the "Stronger Futures" legislation in the Northern Territory and their inquiry on proposed amendments to the Racial Discrimination Act.

V. Principal human rights concerns

A. Constitutional recognition, treaty and truth commission

22. The Special Rapporteur commends the bipartisan political support since 2011 for ensuring recognition of Aboriginal and Torres Strait Peoples in the Constitution. The consultations, led by the Referendum Council[11] through a series of dialogue meetings with indigenous representatives across the country, play a key role in informing that process. The Special Rapporteur met with the Co-Chairs of the Referendum Council and briefly took part in the consultation in Cairns.

23. Constitutional recognition of indigenous peoples is of fundamental importance as it celebrates the history and cultural heritage of the First Peoples of Australia and provides a key measure of reconciliation by acknowledging to their role in the national identity. While recognizing the complexities constitutional change entail (i.e. requiring the majority vote both of the population and of the States), the Special Rapporteur notes that the government initiative has dragged on for nearly a decade. Already at the time of her predecessor's visit in 2009, the Government had recognized the need for constitutional recognition.

[6] See www.humanrights.gov.au/how-are-human-rights-protected-australian-law.
[7] See www.coag.gov.au/about-coag.
[8] See http://closingthegap.pmc.gov.au/.
[9] See www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice.
[10] See www.aph.gov.au/joint_humanrights.
[11] See www.referendumcouncil.org.au/.

24. Indigenous peoples informed the Special Rapporteur about complementary proposals to negotiate treaties with the Government and to establish a truth commission to ensure better public recognition of the structural powerlessness inflicted through history. Such measures would pay tribute to the unique role of Aboriginal and Torres Strait Islanders in Australian society, recognize their rights and contribute to better public awareness of how past policies and practices have conditioned and curtailed their present participation in Australian society.

25. The Special Rapporteur notes as very positive that the governments of Victoria, South Australia and the Northern Territory are already leading initiatives to seek a treaty with Aboriginal peoples.

26. After her visit, the Special Rapporteur was informed of the outcome of the consultation process adopted on 26 May 2017, referred to as "the Uluru Statement of the Heart". It calls for the establishment of a "First Nations Voice" enshrined in the Constitution and of a "*makarrata*" commission to supervise an agreement process between governments and First Nations that would include truth-telling about Aboriginal and Torres Strait Islander peoples' history.[12] The Referendum Council presented its final report to the Prime Minister and the Leader of the Opposition on 30 June 2017.

B. Racism and racial discrimination

27. During the visit, the Government regretfully decided for the second time since 2014 to pursue a bill to amend section 18C of the Racial Discrimination Act. The Parliamentary Joint Committee on Human Rights reviewed the Act in its comprehensive inquiry and report, presented in February 2017, on whether the it imposes unreasonable restrictions on freedom of speech.[13]

28. The Special Rapporteur was further disheartened by the fact that the Government had chosen to launch the bill on 21 March, the International Day for the Elimination of Racial Discrimination. The proposed changes to the provisions would replace the terms "offend, insult, humiliate" with the term "harass", and would include the notion of the "reasonable member of the Australian community" as the standard by which any acts would be judged, rather than by members of the affected community. Indigenous organizations were excluded from participating during the Senate debate on the draft bill. The draft bill was defeated in the Senate, which hopefully marks the end of the matter.

29. While recognizing the need to balance the right to freedom of expression with the protection against racial discrimination, the Special Rapporteur wishes to underline that the debate on this issue has been hugely damaging for the trust that indigenous peoples have in the Government. It has also sent the unfortunate signal to the public and the media that racial vilification is permissible and risks undermining efforts by the Government to seek reconciliation with Aboriginal and Torres Strait Islander peoples.

30. The Special Rapporteur found deeply disturbing the numerous reports on the prevalence of racism against Aboriginal and Torres Strait Islander Peoples. Racism manifests itself in different ways, ranging from public stereotyped portrayals as violent criminals, welfare profiteers and poor parents, to discrimination in the administration of justice. Aboriginal doctors and patients informed the Special Rapporteur about their experiences of racism within the medical sector and their reluctance to seek services from mainstream medical providers. Institutional racism has been identified in the National Aboriginal and Torres Strait Islander Health Plan (2013-2023) and its implementation plan as a significant barrier in the delivery of health care.[14] Support for Aboriginal and Torres Strait Islander managed medical services is indispensable for improving health indicators

[12] See www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF.

[13] See www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

[14] See www.health.gov.au/natsihp.

and overcoming disadvantage. Greater cultural awareness raising among non-indigenous medical professionals is also required.

31. There are also more subtle elements of racism, stemming from the failure to recognize the legacy of two centuries of systemic marginalization. The mainstream education system contains inadequate components on Aboriginal and Torres Strait Islander history and the impact of colonization. The non-recognition of the socioeconomic exclusion and the impact of intergenerational trauma on indigenous peoples continue to undermine reconciliation efforts. In order to truly recognize the situation of Aboriginal and Torres Strait Islanders today, there needs to be much greater public awareness of their perspectives on history and the consequences of past policies and legislation, including the long-term damage and rupture of social bonds caused by the forced removal and institutionalization of their children.

C. Human rights legislative framework

32. Australia does not have a bill of rights. In view of the ongoing difficulties in harmonizing international human rights obligations in federal, state and territory legislation, the Special Rapporteur considers that a more comprehensive human rights legislative framework would provide stronger protection for the rights of indigenous peoples.

33. The Special Rapporteur notes as positive that developments at the state level are leading the way, notably through the Human Rights Act 2004 of the Australian Capital Territory and the Charter of Human Rights and Responsibilities Act 2006 (Victoria). She was furthermore encouraged to hear that the Human Rights Act 2004 was recently amended to insert a specific provision to protect the cultural rights of Aboriginal and Torres Strait Islanders, with specific reference to the United Nations Declaration on the Rights of Indigenous Peoples.

D. Self-determination and participation

34. When Australia officially endorsed the Declaration in 2009, the Government stated its intent to reset relations between indigenous and non-indigenous Australians and to build trust in order to work together to overcome the legacy of the past and shape the future together. Furthermore, in its pledge as part of its candidacy to become a member of the Human Rights Council for the period 2018-2010, Australia committed itself to giving practical effect to the outcome document of the Declaration and the World Conference on Indigenous Peoples.

35. Self-determination is a fundamental element of the Declaration whereby indigenous peoples have the right to determine their political status freely and pursue their economic, social and cultural development freely (art. 3) and have the right to autonomy or self-government in matters relating to their internal and local affairs, and the ways and means for financing their autonomous functions (art. 4). The Declaration also states that indigenous peoples have the right to participate in decision-making in matters that affect their rights (art. 18).

36. While Australia has adopted numerous policies aiming to address the socioeconomic disadvantage of Aboriginal and Torres Strait Islander peoples, the failure to respect their rights to self-determination and to full and effective participation is alarming. The compounded effect of these policies has contributed to the failure to deliver on the targets in the areas of health, education and employment in the "Closing the Gap" strategy and has contributed to aggravating the escalating incarceration and child removal rates of Aboriginal and Torres Strait Islanders.

E. Indigenous Advancement Strategy

37. The Special Rapporteur was informed that the "Indigenous Advancement Strategy", initiated by the Government in 2014, entailed a radical cut of $A534 million to Aboriginal

and Torres Strait Islander programmes and required competitive tender bids for organizations providing services to indigenous communities. The Strategy centralized programmes to the Department of the Prime Minister and Cabinet, and its implementation has been bureaucratic and rigid and has wasted considerable resources on administration. As the Special Rapporteur travelled across the country, she was told repeatedly about the dire consequences of the Strategy.

38. The Strategy has effectively undermined the key role played by indigenous organizations in providing services for their communities. Around 55 per cent of the initial tenders were awarded to non-indigenous organizations, which shifted implementation to mainstream organizations that were neither run by Aboriginal and Torres Strait Islanders nor based in their communities. Many indigenous organizations were forced to close or drastically downsize and reduce the basic services they had been providing to their communities in the areas of health, housing and legal services. Non-indigenous organizations that fly in and fly out of communities have executed projects in culturally inappropriate ways and further undermined capacity-building in local indigenous-led organizations.

39. The Special Rapporteur observes that the Strategy has had a devastating impact on indigenous organizations and has dented their trust in the Government. It runs contrary to the principles of self-determination and participation and the publicly expressed commitment of the Government to doing things with rather than to Aboriginal and Torres Strait Islander people.

40. However, the Special Rapporteur notes as positive the statement made by the Minister for Indigenous Affairs during their meeting, in which he recognized the importance of making indigenous-led organizations responsible for implementing local programmes and stating that the ambition of the Government was to transfer such responsibility fully to indigenous organizations.

41. Notwithstanding, the Special Rapporteur finds it disconcerting that numerous representatives of indigenous organizations informed her of reprisals levied against them in the form of their exclusion from consultations on key policies and legislative proposals. Furthermore, she is deeply troubled by information indicating that funding cuts have specifically targeted organizations undertaking advocacy and legal services and that provisions inserted in funding agreements restrict the freedom of expression. She notes that the Special Rapporteur on human rights defenders raised the similar concerns during his country visit to Australia in October 2016.[15]

F. National Congress defunding

42. Since 2014, the explicit defunding by the Government of the national representative body for indigenous peoples, the National Congress of Australia's First Peoples, runs counter to the stated commitment of the Government to working with indigenous peoples. The establishment of the Congress in 2010 followed extensive consultations among indigenous peoples and is in accordance with article 18 of the Declaration, which states that indigenous peoples have the right "to participate in decision-making in matters which affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions". The Declaration also affirms in its article 39 that indigenous peoples have the right "to have access to financial … assistance from States … for the enjoyment of the rights contained in this Declaration".

43. In 2013, in a parallel move, the Government established the Indigenous Advisory Council, which reports directly to the Prime Minister. While the Council is composed of indigenous experts in specific areas, it is not representative of Aboriginal and Torres Strait Islander peoples as its members are appointed by the Prime Minister.

[15] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

44. The Special Rapporteur recalls that the Government accepted, in the context of the universal periodic review in 2015 to "continue to support indigenous institutions that bring cohesion to communities, such as the National Congress of the First Peoples of Australia".[16] Financial and political support for the Congress to operate effectively is crucial to prove the commitment of the Government to advancing indigenous rights. Following her visit, the Special Rapporteur was informed by the Government that some funding for the Congress had been reinstated. However, she is concerned that funding remains insufficient for the Congress to exercise its mandate fully.

45. While in Canberra, the Special Rapporteur met with the Aboriginal and Torres Strait Islander Elected Body of the Australian Capital Territory, which is currently the only such body in the country at the state or territory level. The body meets on a regular basis with the Government of the Australian Capital Territory to discuss policy issues and offers a positive model for engagement with indigenous peoples.

G. Closing the Gap strategy

46. The "Closing the Gap" strategy has been in existence for nearly a decade. However, in its 2017 report on health, education and unemployment targets,[17] the Government recognizes that only one of the seven targets — to halve the gap in Year 12 attainment rates — is on track. The Government did not expect to meet targets to close or reduce the gap in the remaining six targets, including on life expectancy, infant mortality, education and employment. Aboriginal and Torres Strait Islander peoples continue to die on average 10 years younger than other Australians, with no major improvements being recorded. In the Northern Territory, the life expectancy of Aboriginal people is the lowest in the nation and the gap between the non-indigenous population is 16 years for men and 14 years for women.

47. It is woefully inadequate that, despite having enjoyed over two decades of economic growth, Australia has not been able to improve the social disadvantage of its indigenous population. The existing measures are clearly insufficient as evidenced by the lack of progress in achieving the "Close the Gap" targets.

H. Health services

48. Social and cultural determinants explain almost one third of the health gap between indigenous and non-indigenous people. In 2015, nearly 45 per cent of indigenous peoples reported having a disability or long-term health condition. Understanding the impacts of intergenerational trauma and racism are essential factors in order to address the health situation of indigenous peoples effectively.

49. The Government has taken steps to improve the health of indigenous peoples through the National Aboriginal and Torres Strait Islander Health Plan 2013-2023, and the Special Rapporteur notes as positive that the plan adopts a human rights-based approach informed by the Declaration.[18]

50. In order for the Implementation Plan for the Health Plan to be successful, the Government must invest in partnerships that recognize the leadership of Aboriginal and Torres Strait Islanders. The workforce of indigenous Australian medical professionals has expanded in the past decade and developed valuable expertise. However, parity is still lagging as Aboriginal and Torres Strait Islanders still make up less than 1 per cent of the national health workforce. Support for training more indigenous health professionals is therefore required.

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[16] See A/HRC/31/14/Add.1, para. 28, in which Australia accepted the recommendation in para. 136.87 of A/HRC/31/14.

[17] See http://closingthegap.pmc.gov.au.

[18] See www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-healthplan-toc~framework.

51. Aboriginal Community Controlled Health Services have achieved remarkable success in delivering culturally appropriate services for primary health care. However, the Special Rapporteur was informed by multiple stakeholders during her visit about inequalities in the resources available for rural and remote service delivery and of cuts to community managed primary health care, which play an essential role, for example in the prevention of chronic diseases.

52. Aboriginal and Torres Strait Islanders also told the Special Rapporteur about their feelings of powerlessness, loss of culture and lack of control over their lives. Suicide rates among Aboriginal and Torres Strait Islander people are escalating at a shocking rate and are double that of non-Indigenous Australians. The current situation was described to the Special Rapporteur as a suicide epidemic. While visiting the Kimberley region in Western Australia, she learned about youth-developed and -driven projects to prevent suicide among Aboriginal adolescents. She strongly urges that such initiatives be supported and replicated. Adopting a holistic approach to social and emotional well-being that recognizes the need for cultural connection is essential to achieve sustainable improvement in health indicators.

53. Aboriginal-led health research capacity has been established and should be drawn upon to inform policies. Strengthened financial and political support for Aboriginal- and Torres Strait Islander-led expertise, professional development and research is crucial in order to close the gap in relation to key health inequalities faced by indigenous peoples. In order for such measures to be sustainable, longer-term funding agreements are necessary.

I. Access to education

54. In the area of education, large gaps remain, notably between children living in urban versus remote areas. Despite the adoption of the National Aboriginal and Torres Strait Islander Education Strategy, there had been no real change in school attendance rates between 2014 and 2016. The Special Rapporteur was informed that Aboriginal community involvement in early childhood, primary and secondary education has declined over the past decade, particularly in the formulation and delivery of programmes, and that centralized decision-making without appropriate cultural awareness has led to poor policies and practices in Aboriginal education.

55. It is essential to increase parents' and community engagement with schools, for example, by introducing Aboriginal parents' groups in schools or community-controlled school boards. A trauma-informed approach to education should identify the barriers to attendance and help parents and families to improve it. The current application of financial penalties should be discontinued as they further disadvantage children who already live in poverty, and who are likely to be exposed to overcrowded and poor housing, family violence, chronic illnesses and food insecurity. Unless such action is taken, Aboriginal children, especially in remote areas, are set up to fail.

56. Regrettably, Aboriginal languages are seen as a barrier to education rather than an asset, and bilingual education programmes have been wound back in remote communities. The lack of secondary school provision in remote communities forces parents to send children to secondary boarding schools, far away from family, community and their country.

J. Unemployment and housing shortage

57. Equal opportunity of employment is critical to overcoming disadvantage. Efforts to reach the "Closing the Gap" target of halving the gap in employment between indigenous and non-indigenous Australians within a decade (by 2018) have been unsuccessful and rather indicate negative trends. The national unemployment rate for Aboriginal and Torres Strait Islander people is 20.8 per cent, compared with the national average of approximately 5-6 per cent.

58. In 2015, the Government introduced the Community Development Programme in remote areas. Among the jobseekers enrolled in the Programme, 83 per cent identify as

Aboriginal and Torres Strait Islander people.[19] The Programme imposes an inflexible digitalized regime on recipients that issues penalty notices and docks their pay for missed scheduled work. Under the Programme, contracted organizations that provide employment have fewer opportunities to tailor engagement strategies to local communities or to particular individuals. The rate at which jobseekers within the Programme are penalized is around 27 times that of mainstream, predominantly non-indigenous, jobseekers. In practice, these requirements are discriminatory, being substantially more onerous than those that apply to predominantly non-indigenous jobseekers.

59. Housing remains in short supply in many indigenous communities, and low levels of income have forced people into overcrowded or dilapidated housing. While in Darwin, the Special Rapporteur visited Aboriginal town camps and was appalled by the dismal conditions therein, in particular the lack of basic sanitation services. The helplessness and shame that many feel when they are unable to find work results in the entrenchment of poverty and money being spent on illicit substances as opposed to basic needs. The high rates of homelessness, overcrowding and poor housing have a high impact on Aboriginal and Torres Strat Islander health indicators and fuel the disproportionately high rates of Aboriginal children entering the child protection and youth detention systems.

K. Compulsory income management

60. The application of a compulsory income management scheme was a key feature of the "Northern Territory Intervention" and persist through its successor, the "Stronger Futures" legislation. The vast majority of those affected by the measures are Aboriginal and Torres Strait Islanders. In 2009, the previous Special Rapporteur criticized the impact that the Intervention had had, and specifically the suspension by the Government of the Racial Discrimination Act, which had removed legal protections for Aboriginal peoples in the Northern Territory.

61. While the Racial Discrimination Act was reinstated in December 2010 and legislation was revised and renamed "Stronger Futures" in 2012, it continues to apply punitive measures. During her visit to the Northern Territory, Aboriginal communities told the Special Rapporteur of how they feel stigmatized by being subjected to compulsory income management, forced participation in "work for the dole" schemes (that pay individuals far less than an average reward rate) and the application of fines and welfare reductions for parents whose children play truant from school. As part of the compulsory income management scheme, welfare payments are partially quarantined and provided through a "BasicsCard", which restricts people's purchases to specific stores and items. The Special Rapporteur was told by users of the card that it causes humiliation, for example as certain shops require them to queue separately.

62. The administrative costs of running the scheme are very high, and the Special Rapporteur was informed that this has drained financial resources that could have been better invested in improving housing conditions.

63. The Parliamentary Joint Committee on Human Rights, in its 2016 review of the "Stronger Futures" measures, described the scheme as an "intrusive measure that robs individuals of their autonomy and dignity and involves a significant interference into a person's private and family life".[20]

64. In a parallel development, the Special Rapporteur notes that voluntary income management is being trialled in two "empowered communities" following specific requests from the community. Unlike under the compulsory income management scheme in the Northern Territory, local indigenous communities have participated actively in this policy design. The impact of voluntary income management has yet to be fully assessed.

[19] See www.dpmc.gov.au/indigenous-affairs/employment/community-development-programme-cdp.

[20] See http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report.

65. The Special Rapporteur was informed that certain Aboriginal women's organizations are in favour of income management measures as they consider that these have improved the safety of women and children as well as food security.

L. Incarceration and the administration of justice

66. The administration of justice and detention practices were raised as key concerns during the country visit. The extraordinarily high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern. While Aboriginal and Torres Strait Islanders make up only 3 per cent of the total population, they constitute 27 per cent of the national prison population. More than half of the children in detention are Aboriginal and Torres Strait Islanders. In some detention facilities, such as in the Northern Territory and in the Cleveland Youth Detention Centre in Queensland, indigenous children constitute an astonishing 90 per cent of the detainees, which prima facie raises concerns over racial discrimination in the administration of justice.

67. The proportion of Aboriginal and Torres Strait Islanders continues to rise and is expected to reach 50 per cent of the overall prison population by 2020. Despite the comprehensive recommendations issued to address incarceration rates over 25 years ago in the Royal Commission into Aboriginal Deaths in Custody in 1991, the indigenous prison population has on the contrary doubled during that period. The reasons for the overrepresentation of Aboriginal and Torres Strait Islanders in Australian prisons are manifold. Imprisonment is the end result of years of dispossession, discrimination and intergenerational trauma faced by Aboriginal and Torres Strait Islanders. It is also caused by the lack of political will to address the situation, despite that key measures for improvement have been repeatedly identified by a string of national and state inquiries, royal commissions, coroners' reports and international human rights monitoring mechanisms.

68. Current laws and policies continue to contribute to the swift escalation in the incarceration rates of Aboriginal and Torres Strait Islanders. Though not explicitly targeted at those populations, their disproportionate impact is clear. For instance, paperless arrests laws in the Northern Territory, which allow the police to detain a person for several hours if they have committed or are suspected to have committed a minor offence, have led to a dramatic increase in the number of indigenous persons in police custody. Bail laws and policies have become more restrictive in most States and Territories and have led to a significant increase in the number of Aboriginal and Torres Strait Islanders held on remand. Longstanding calls for the abolishment of mandatory sentencing laws, notably in Western Australia, continue to be ignored. The current inquiry by the Australian Law Reform Commission into the Incarceration of Aboriginal and Torres Strait Islander Peoples should help identify laws that need to be amended to reduce such incarceration, and the Government must act on those laws to impede this national crisis, which has devastating effects on the indigenous community.

69. Funding for legal services for Aboriginals and Torres Strait Islanders has been reduced since 2015, which has had a significant impact on Aboriginal and Torres Strait Islanders, who have higher rates of unmet legal needs, owing inter alia to not speaking English as their first language and having lower literacy skills. High-quality and culturally competent legal assistance services are critical to ensure access to justice for Aboriginal and Torres Strait Islanders and to reduce imprisonment. The Special Rapporteur is pleased to learn, that subsequent to her visit, federal funding cuts for Aboriginal and Torres Straits Islander legal services were reversed in May 2017. A national mapping of unmet legal needs has however yet to be undertaken, a step that is essential in order to overcome the persistent disadvantage and to address effectively incarceration rates.

70. Since the 1991 Royal Commission into Aboriginal Deaths in Custody, there have been over 340 deaths of Aboriginal and Torres Strait Islanders in detention. Certain deaths have been caused by the negligence of the staff responsible for the care of the person in custody. This was the case for Ms. Dhu, a 22-year-old indigenous woman who died within 48 hours of being taken into police custody in Western Australia in August 2014. She

received inadequate medical care and suffered police actions described by the Coroner as "unprofessional and inhumane".[21] The Special Rapporteur met with officials of the Coroner's Court of Western Australia, which conducted the inquest into the death of Ms. Dhu, and made important recommendations that must be implemented as a matter of priority in order to prevent similar deaths in custody. Since the State Coroner does not examine issues of civil or criminal liability, it remains important to investigate such matters, including in the case of Ms. Dhu.

71. Among the numerous recommendations of the Royal Commission into Aboriginal Deaths in Custody that the Government has still failed to implement, is the adoption of custody notification services throughout the country. Next of kin should be informed that their relative has been taken into custody as a minimum safeguard against irregular detention practices. Such notification services, despite not carrying major cost implications, are currently only available in New South Wales and the Australian Capital Territory.

72. Ms. Dhu was in police custody for fine default. In Western Australia, a growing number of Aboriginal women find themselves unable to pay fines and are taken into custody as result. The Special Rapporteur visited Bandyup prison, a women's prison in Perth, where Aboriginal women comprised 48 per cent of the detainees. She is particularly concerned to learn that many of the Aboriginal women had no access to housing when they came out of prison. As a result of incarceration, many women also struggled to keep ties with and to regain custody of their children. The laws on fine default are an example of legislation having a disproportionate impact on Aboriginal women.

73. Aboriginal women and girls are the fastest growing prison population across the country. As pointed out by the Special Rapporteur on violence against women, its causes and consequences during her visit to Australia in February 2017, many incarcerated women and girls have been the victims of domestic violence and sexual abuse.[22] Despite knowledge of such victimization, detention facilities lack support services for women who have suffered sexual assault and were in fact cut in Bandyup prison in 2016. Gender-sensitive measures are required to reduce rates of imprisonment of Aboriginal women and girls and should be developed based on consultations directly with them.

74. Aboriginal and Torres Strait Islander children are 24 times more likely to be detained than non-indigenous children. The Special Rapporteur found the routine detention of young indigenous children the most distressing aspect of her visit. In Cleveland Youth Detention Centre, she met several children as young as 12 years old. Many of the children had already been detained several times at the same facility and more or less gone straight from out-of-home care into detention. The majority of the detained children are on remand.

75. The application of criminal responsibility as low as at the age of 10 years across the country is deeply troubling and below international standards. This situation is aggravated by the failure to apply diversion measures and community programmes and the placement of children in high-security facilities, such as the Cleveland Youth Detention Centre. All personnel in detention facilities should receive training on culturally sensitive child care. The facility is strictly regulated and run based on punitive measures for misdemeanours as minor as overstaying in the pool in the facility.

76. Several sources, including judges, informed the Special Rapporteur that, in the majority of instances, the initial offences committed by children were minor and non-violent. In such cases, it is wholly inappropriate to detain children in punitive, rather than rehabilitative, conditions. Aboriginal and Torres Strait Islander children are essentially being punished for being poor and, in most cases, prison will only perpetuate the cycle of violence, intergenerational trauma, poverty and crime. The Special Rapporteur was alarmed that several of the young children she spoke to detention did not see any future prospects for themselves.

77. As already recommended several times over the past two decades by the Committee on the Rights of the Child, the Special Rapporteur urges Australia to increase the age of

[21] See www.coronerscourt.wa.gov.au/_files/dhu%20finding.pdf.

[22] See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21243&LangID=E.

criminal responsibility. Children should be detained only as a last resort, which certainly is not the case today for Aboriginal and Torres Strait Islander children. Detention of those children has become so prevalent in certain communities that some parents referred to it as an achievement that none of their children has been taken into custody so far. Much more should be done to ensure that the detention of children remains the exception, rather than the norm.

78. If Aboriginal and Torres Strait Islander children are detained, they should be treated with respect and dignity. As demonstrated by the ongoing investigation of the Royal Commission into the Protection and Detention of Children in the Northern Territory, there have been allegations of serious abuses, including violent strip-searches, teargassing, hooding and prolonged isolation committed against Aboriginal children in custody.

79. In both Bandyup prison and Cleveland Youth Detention Centre, the Special Rapporteur noted that persons on pretrial remand detention were held together with convicted persons, which raises serious concerns under article 10 (2) of the International Covenant on Civil and Political Rights. She also found deeply troubling the presence of Aboriginal persons with cognitive impairment in detention without any support for their medical condition. The Special Rapporteur was furthermore concerned to learn that children aged 17 were still being held in adult prisons in Queensland.

80. The Special Rapporteur welcomes the recent announcement by the Government that Australia intends to ratify Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment before the end of 2017, which will require the establishment of a national system of independent and regular monitoring of all places of detention, a measure that the country is in dire need of. The Special Rapporteur visited the Office of the Inspector of Custodial Services in Western Australia, which offers a good model and should be replicated in other states and territories, with an added mandate to cover police custody.

81. Adequate and culturally appropriate health services in detention facilities are lacking and should be ameliorated by the targeted recruitment of Aboriginal health professionals. The Special Rapporteur furthermore recommends that more efforts be made to train and recruit Aboriginal and Torres Strait Islander police, legal professionals and prison personnel. All non-indigenous staff should be trained in cultural sensitivity.

82. The focus urgently needs to move away from detention and punishment towards rehabilitation and reintegration. Locking up people costs tax payers vast amounts of money. For instance, the Special Rapporteur was told that detaining a child costs between $A170,000 and $A200,000 per year. Such funds should be allocated to prevention and reintegration. In that regard, the Special Rapporteur learned about local diversion initiatives, often referred to as justice reinvestment programmes, designed to address the causes of crime in specific communities. In Redfern, a suburb of Sydney, she visited the "Clean Slate Without Prejudice Programme", which is run by an Aboriginal organization in collaboration with the police and has contributed to a significant decrease in the crime rate there over the past few years. Diversion programmes would significantly reduce incarceration rates if replicated across the country in consultation with local communities.

83. The Special Rapporteur was impressed with the Children's Koori Court in Melbourne, which involves the participation of elders and respected persons from the Koori community in its procedures and aims to reduce imprisonment and recidivism. Such culturally sensitive processes could significantly reduce recidivism rates if extended to other jurisdictions.

84. The Special Rapporteur notes the report "Prison to Work", endorsed by the Council of Australian Governments in December 2016, which provides valuable proposals for reintegration and places emphasis on the need for enhanced and culturally appropriate services, notably in the areas of employment, housing and welfare, following prison release, in order to reduce recidivism. She encourages the federal, state and territory governments to take concrete action and allocate funding to implement those proposals.

85. The high rates of incarceration were described to the Special Rapporteur as a tsunami affecting indigenous peoples with devastating consequences for concerned

individuals and communities. The Federal Government has recognized that incarceration is a national concern, including by its request in October 2016 that the Australian Law Reform Commission conduct an inquiry into incarceration rates of Aboriginal and Torres Strait Islander peoples. However, as long as the issue of overrepresentation of indigenous peoples in custody is not addressed in practice and continuously monitored, there will only be limited progress in closing the gap in the areas of health, education and employment. The "Change the Record" coalition of Aboriginal and Torres Strait Islander and civil society organizations has provided an excellent blueprint of recommendations [23] for concrete measures that would provide swift improvements of detention conditions.

86. The current claim by the Government that matters relating to incarceration remain the sole prerogative of states is untenable in the severe and worsens the impact of the national detention crisis on the Aboriginal and Torres Strait Islander peoples. The Special Rapporteur underlines that it is the responsibility of the federal Government to ensure compliance with international human rights obligations. The inclusion of targets on justice in the "Closing the Gap" strategy and the development and implementation of a national plan of action are needed to address the incarceration crisis.

M. Removal of children

87. Indigenous children are removed from their families at increasingly high rates. The prolonged impacts of intergenerational trauma from the Stolen Generations, disempowerment and entrenched poverty continue to inform Aboriginal and Torres Strait Islanders' experiences of child protection interventions. The Special Rapporteur was told of the grief and helplessness felt by parents and children owing to their separation, and the link this has to high rates of mental illness and substance abuse.

88. In 1997, the year in which the report entitled "Bringing Them Home" was published (see para. 92), Aboriginal and Torres Strait Islander children constituted 20 per cent of children in out-of-home care. By 2016, that figure had increased to 36 per cent, with Aboriginal and Torres Strait Islander children being 10 times more likely than non-indigenous children to be in out-of-home care.

89. The Aboriginal and Torres Strait Islander Child Placement Principle was first implemented in 1983 with the purpose of enhancing and preserving Aboriginal children's sense of identity through the prevention of out-of-home care, reunifying children with their families, ensuring culturally connected placements and enabling the participation of Aboriginal and Torres Strait Islander families and communities in child protection decision-making. Despite that, the incidence of indigenous children in out-of-home care is increasing rapidly and has reached critical levels. In 2016, on average, only 66 per cent of Aboriginal and Torres Strait Islander children for whom child protection measures were ordered were placed within their family, kin and community; the Government is failing to comply with the Principle.

90. Greater engagement with the Aboriginal and Torres Strait Islander family and community in decision-making processes around child protection is crucial. Community-led early intervention programmes that invest in families would prevent children from being in contact with the child protection system in the first place.

91. The number of Aboriginal and Torres Strait Islander children in out-of-home care is predicted to almost triple by 2035. Measures must therefore be put in place urgently. To monitor the situation, an Aboriginal children's commissioner in each state and territory and a national coordinating entity could play a valuable role. Development, in consultation with peak indigenous organizations, should be considered of a national strategy to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care.

[23] See https://changetherecord.org.au/the-solutions.

N. Stolen Generations and reparation

92. 2017 marks the twentieth anniversary of the publication of "Bringing Them Home",[24] the report on "stolen children" that concluded that the forced removal of Aboriginal and Torres Strait Islander children had been genocidal and had constituted a crime against humanity for which reparation was due under international law. The forced removals had ruptured cultural ties, broken down family and social structures and resulted in intergenerational trauma that continued to disadvantage indigenous communities. There were links between past and present child removal practices as indigenous peoples who had themselves been placed in institutions never experienced growing up in a family environment, placing them at a disadvantage in developing their own parenting skills. The Special Rapporteur learned about instances where three generations of children had been removed from their families and placed in institutions.

93. The Special Rapporteur welcomes the ongoing Stolen Generations reparations schemes in New South Wales and South Australia and the reparations already paid in Tasmania, and reiterates the recommendation in "Bringing Them Home", also supported by the Australian Human Rights Commission, that a comprehensive national mechanism be established to ensure that adequate reparations, including compensation, are provided to the victims of the Stolen Generations policies.

O. Violence against women

94. Discrimination against Aboriginal and Torres Strait Islander women on the grounds of gender, race and class is structurally and institutionally entrenched. This discrimination, coupled with the lack of culturally appropriate measures to address the issue, fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women. Indigenous women are 10 times more likely to die of violent assault and 32 times more likely to be hospitalized as a result of violence-related assault compared with non-indigenous women.

95. Those statistics may not reflect the actual numbers owing to high underreporting rates, estimated at 90 per cent. Underreporting is related to the issue of distrust of the current system, highlighting the importance of Aboriginal community-led programmes where women can regain trust and seek out culturally safe service provision. Some women do not report family violence out of fear that their children may be removed. The Special Rapporteur was troubled by information indicating that certain Aboriginal family violence prevention legal services had to turn away 30 to 40 per cent of women seeking assistance owing to a lack of resources. She urges that additional financial support to those legal services be provided and based on a national needs-based assessment.

96. Family violence is an intersectional concern that overlaps with homelessness, poverty, incarceration, health and the removal of children. If not tackled comprehensively, family violence will remain cyclical and undermine efforts to address related issues. In 2016, the Government launched the Third Action Plan of the National Plan to Reduce Violence Against Women and Their Children, which lists among its priorities Aboriginal and Torres Strait Islander women and children. However, the Special Rapporteur concurs with the Special Rapporteur on violence against women that a specific national action plan on violence against Aboriginal and Torres Strait Islander women is needed and should be developed in close consultation with indigenous women and other relevant stakeholders.

P. Political participation

97. Currently only 50 per cent of the Aboriginal and Torres Strait Islander population is on the electoral role. This is partly due to eligible voter criteria, including the requirement of a fixed address and a ban on voting by prisoners serving a sentence of more than three

[24] See https://healingfoundation.org.au/bth20/.

years, which disproportionately affects indigenous peoples.[25] The Special Rapporteur was informed about measures in place by the Australian Electoral Commission to increase the number of indigenous voters, but urges that those measures be reinforced, in consultation with indigenous communities and organizations, as a matter of priority in order to improve Aboriginal and Torres Strait Islanders' exercise of their right to political participation.

Q. Land rights and native title

98. As with other indigenous peoples around the world, land rights are central to the cultural identity and economic development of Aboriginal and Torres Strait Islanders. 2017 marks the twenty-fifth anniversary of the landmark Mabo decision, which held that the common law of Australia recognized native titles held by indigenous peoples to their traditional lands. The decision led to the adoption of the Native Title Act 1993 (Cth), which set out the processes for determining native title rights. The rights of Aboriginals and Torres Strait Islanders to around 30 per cent of the land area of the country are formally recognized, yet in most instances only "non-exclusive" rights are recognized. A further 27 per cent of Australia territory is subject to native title claims, processes that are extremely protracted.

99. In order to succeed, claimants under the Native Title Act must prove that they have had an uninterrupted connection to the area being claimed, and that they have continued to practice their traditional laws and customs. This is an extraordinary challenge and burden of proof in the context of the historical forced removal and dispossession policies of Australia. The Special Rapporteur furthermore notes the complex system with multiple and overlapping legal regimes applicable to native title claims and land rights at the federal, state and territory levels. There are insufficient indigenous legal professionals with expertise on land rights claims, which continues to disadvantage communities seeking to exercise their rights.

100. Aboriginal and Torres Strait Islanders have been negotiating Indigenous Land Use Agreements for years in order to, for instance, resolve native title claims or benefit from development activities carried out on their lands. While some Agreements are controversial, others are not and have brought important economic benefits for indigenous communities.

101. In its *McGlade* decision of 2 February 2017, the Federal Court created legal uncertainty by requiring that, in order to be valid, indigenous land use agreements should be signed by all native title claimants. The Government reacted by proposing a bill to amend the Native Title Act. The bill, passed on 14 June 2017, validates existing agreements already negotiated and registered before the *McGlade* decision, even though they had not been signed by all native title claimants. In that regard, the Special Rapporteur recalls that the principle of free, informed and prior consent does not require the consent of all. Having said that, there are many different types of indigenous land use agreements and some have far-reaching consequences on native title rights and even lead to the surrender of all native title (as in the *McGlade* case).

102. The Special Rapporteur appreciated learning about the joint management of protected areas for conservation in several parts of the country, including in Kimberley. The creation and joint management of those protected areas allow traditional owners to continue to enjoy their customary practices, while providing conservation and direct employment opportunities for indigenous peoples. The Special Rapporteur was also encouraged by the highly successful government-funded indigenous rangers' programme, which supports indigenous peoples' connection to their lands, encourages cultural knowledge transfer, provides skilled employment and simultaneously contributes to conservation.[26]

103. During the visit, she was informed about successful native title claimants who wished to declare their lands protected areas but faced administrative obstacles in doing so. She encourages the authorities to take steps to facilitate the extension of protected areas

[25] See https://freedomhouse.org/report/freedom-world/2016/australia.

[26] See www.dpmc.gov.au/indigenous-affairs/environment/indigenous-rangers-working-country.

when requested by Aboriginal and Torres Strait Islander Peoples. Following her mission, she was pleased to learn about the designation of additional federal funding allocations for protected areas.

VI. Conclusions and recommendations

104. **While the Government has adopted numerous policies to address the socioeconomic disadvantage of Aboriginal and Torres Strait Islanders, those policies do not duly respect the rights to self-determination and to full and effective participation. The compounded effect of the policies contributes to the failure to deliver on the targets in the areas of health, education and employment in the "Closing the Gap" strategy and fuels the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islanders. Comprehensive revision of the policies needs to be a national priority, and the consequences and prevalence of intergenerational trauma and racism must be acknowledged and addressed. Aboriginal and Torres Strait Islanders require better recognition and active participation in Australian society.**

105. **The Special Rapporteur was particularly impressed and inspired by the strength of spirit and commitment of Aboriginal and Torres Strait Islanders to develop innovative measures to support their own communities. Over the past decade, indigenous-led peak bodies have been established and have grown in a wide range of areas, and have developed valuable expertise. In June 2016, the "Redfern Statement" was launched by indigenous peak organizations from all sectors. It lays out six key priority areas and recommendations and covers issues ranging from engagement, health, justice, violence prevention, disability, children and families and calls for a new dialogue with the Government to address some of the major challenges facing Aboriginal and Torres Strait Islander peoples.**

106. **The Special Rapporteur observed effective indigenous community-led initiatives in a range of areas, including public health, housing, education, child protection, conservation and administration of justice, which all have the potential of making immediate positive changes in the lives of Aboriginal and Torres Strait Islanders. The Government could achieve significant progress in realizing the rights of indigenous peoples if it consulted, financially supported and worked hand-in-hand with those organizations.**

Recommendations to the Government

107. **With respect to the institutional and legal framework, the Special Rapporteur recommends that the Government:**

(a) **Place full political weight behind and act on the proposals put forth by the Referendum Council, including the establishment of a "First Nations Voice" in the Constitution and of a commission for treaty negotiation and truth-telling. Such measures would carry momentous significance to resetting the relationship with the First Peoples of Australia;**

(b) **Collaborate closely with and pay due attention to implementation of the recommendations of the Aboriginal and Torres Strait Islander Social Justice Commissioner;**

(c) **Pay due attention to the recommendations of the Parliamentary Joint Committee on Human Rights in its scrutiny reports of draft bills, review of the "Stronger Futures" legislation in the Northern Territory (2016) and inquiry on amendments to the Racial Discrimination Act (2017);**

(d) **Include the United Nations Declaration on the Rights of Indigenous Peoples in the definition of human rights in the Human Rights (Parliamentary Scrutiny) Act of 2011;**

(e) **Create a parliamentary joint committee on indigenous affairs to advance indigenous rights in a bi-partisan manner;**

(f) **Elaborate a comprehensive bill of human rights within the federal Constitution and a human rights act that include due recognition of the provisions in the Declaration.**

108. **Regarding self-determination and participation, the Special Rapporteur recommends that the Government:**

(a) **Revise the "Indigenous Advancement Strategy" and the "Closing the Gap" strategy targets in consultation with the Aboriginal and Torres Strait Islander Social Justice Commissioner, the National Congress, the Indigenous Advisory Council and relevant peak indigenous organizations;**

(b) **Amend the "Closing the Gap" strategy to include specific targets to reduce of detention rates, child removal incidence and violence against women;**

(c) **Renew national partnership arrangements between the Commonwealth and state jurisdictions, enhance coordination between federal- and state-level implementation and improve data collection for more effective annual monitoring of progress;**

(d) **Transfer responsibility for local programme implementation to indigenous-led organizations to build capacity and their ability to exercise self-determination;**

(e) **Reinstate funding for the National Congress and ensure that the Government holds regular meetings to consult with the National Congress;**

(f) **Develop, in partnership with indigenous peoples, a national strategy to give effect to the United Nations Declaration on the Rights of Indigenous Peoples and the World Conference on Indigenous Peoples Outcome Document;**

(g) **Establish mandatory training for civil servants on the provisions in the Declaration, notably the rights to self-determination, participation and free, prior and informed consent.**

109. **Concerning health services, the Special Rapporteur recommends that the Government:**

(a) **Invest in partnerships that recognize the leadership of Aboriginal and Torres Strait Islanders in implementing the National Aboriginal and Torres Strait Islander Health Plan;**

(b) **Increase support for Aboriginal Community Controlled Health Services and training of indigenous health professionals;**

(c) **Provide mandatory training on cultural awareness for non-indigenous medical professionals;**

(d) **Finalize and resource the National Plan for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Well-being and address intergenerational trauma more in more culturally appropriate and effective ways;**

(e) **Provide sustained long-term support for indigenous-led health research.**

110. **On the subject of education, the Special Rapporteur recommends that the Government:**

(a) **Consult with indigenous communities in the development of education policies, implement school curricula that are culturally sensitive and increase the provision of bilingual education;**

(b) **Apply a trauma-informed approach to education that identifies the barriers to attendance and assists parents and families to improve student attendance, rather than the application of financial penalties that further disadvantages children who already live in poverty;**

(c) **Conduct a comprehensive review of the mainstream education curricula to ensure the inclusion of components on Aboriginal and Torres Strait Islander history and the impact of colonization.**

111. **Concerning employment, the Special Rapporteur recommends that the Government reform the Community Development Programme in consultation with indigenous communities, remove discriminatory and punitive measures and reconstruct the unemployment scheme in remote areas around positive incentives and long-term opportunities.**

112. **With respect to housing, the Special Rapporteur recommends that the Government:**

(a) **Take measures, in consultation with indigenous organizations and communities, to develop housing strategies and increase and improve the availability of remote, regional and urban housing. Provide specific housing support to enable Aboriginal and Torres Strait Islander Peoples to remain on their lands rather than migrate to urban areas;**

(b) **Identify and address barriers to housing for families with children and provide urgent responses to families at risk of having a child taken into care when inadequate housing forms part of the risk.**

113. **Concerning incarceration and the administration of justice, the Special Rapporteur recommends that the Government:**

(a) **Ratify as a matter of urgency the Optional Protocol of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and establish an independent national preventive mechanism for regular detention monitoring visits;**

(b) **Adopt, through the Council of Australian Governments, solid commitments and a national plan of action to address the incarceration crisis of Aboriginals and Torres Strait Islander peoples as a matter of national priority;**

(c) **Implement the recommendations by the Australian Law Reform Commission Inquiry into the Incarceration of Aboriginals and Torres Strait Islander peoples and the Royal Commission into Youth Detention in the Northern Territory;**

(d) **Abolish paperless arrest and mandatory sentencing laws and review fine default legislation, as their application is discriminatory in practice;**

(e) **Ensure that there are investigations and accountability, both for civil and criminal liability, for abuses and deaths in detention of Aboriginals and Torres Strait Islanders and that the responsibility to provide reparation is assumed by the State;**

(f) **Provide adequate and long-term funding for Aboriginal and Torres Strait Islander legal services based on a national mapping of unmet needs;**

(g) **Introduce custody notification services in all States and Territories;**

(h) **Ensure that culturally appropriate medical care, including mental health services, are available in all detention facilities;**

(i) **Increase the age of criminal responsibility from 10 years to at least 12 years, in accordance with international standards. Detention of children should be a measure of last resort;**

(j) **Withdraw its reservation to the Convention on the Rights of the Child and ensure that no children are held together with adults;**

(k) **Provide all personnel in detention facilities with training on culturally sensitive child care;**

(l) **Conduct a comprehensive assessment of existing diversion and justice reinvestment programmes and replicate, in consultation with local communities, such measures in targeted areas across the country;**

(m) Extend culturally sensitive judicial processes, using the Koori courts in Victoria as a model, to other jurisdictions throughout the country.

114. As regards the removal of children, the Special Rapporteur recommends that the Government:

(a) Ensure that community-led early intervention programmes invest in families, rather than punish them, in order to prevent children from being in contact with the child protection system;

(b) Develop, in consultation with peak indigenous organizations, a national strategy to eliminate the overrepresentation of Aboriginal and Torres Strait Islander children in out-of-home care and to monitor compliance with the Aboriginal and Torres Strait Islander Child Placement Principle;

(c) Ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

115. On the matter of Stolen Generations and reparation, the Special Rapporteur recommends that the Government establish a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the "Stolen Generations" policies.

116. Regarding violence against women, the Special Rapporteur recommends that the Government develop, in close consultation with indigenous women, a specific national action plan on violence against Aboriginal and Torres Strait Islander women.

117. With respect to political participation, the Special Rapporteur recommends that the Government reinforce as a matter of priority measures by the Australian Electoral Commission, in consultation with indigenous organizations, to increase the number of indigenous voters to improve Aboriginal and Torres Strait Islanders' exercise of their right to political participation.

118. Concerning land rights and native title, the Special Rapporteur recommends that the Government:

(a) Review the system with multiple and overlapping legal regimes applicable to native title claims at the federal, state and territory levels, with a view to aligning them with the United Nations Declaration on the Rights of Indigenous Peoples, which does not contain norms requiring proof of continuous occupation of land;

(b) Subject any native title law reform to adequate consultations with all concerned stakeholders;

(c) Train more indigenous legal professionals with expertise on native title in order to allow Aborigine' and Torres Strait Islander communities to engage in land rights claims in an informed manner;

(d) Extend protected areas when requested by Aboriginal and Torres Strait Islander Peoples;

(e) Continue to support the joint management of protected areas and the indigenous rangers programme as these are laudable examples of best practices.